UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KENNETH BERGE and DAWN BERGE, on behalf of themselves and their minor child Z.B., as individuals and on behalf of all others similarly situated,

Plaintiffs,

Case No. 10-cv-00373-RBW
Hon. Reggie B. Walton

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF DEFENSE, TRICARE MANAGEMENT ACTIVITY, and ROBERT M. GATES, United States Secretary of Defense, jointly and severally,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT TO SET ASIDE, AS CONTRARY TO LAW, DEFENDANT'S POLICY THAT APPLIED BEHAVIORAL ANALYSIS (ABA) THERAPY IS "SPECIAL EDUCATION" RATHER THAN HEALTH CARE

Plaintiffs, by the undersigned counsel, hereby move this Court to grant summary judgment to Plaintiffs and to set aside, as contrary to law, Defendant's policy that Applied Behavioral Analysis (ABA) therapy is "special education," for the reasons stated in the attached Statement of Points and Authorities and Statement of Material Facts.

Respectfully submitted,

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Dated: July 30, 2010

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT TO SET ASIDE, AS CONTRARY TO LAW, DEFENDANT'S POLICY THAT APPLIED BEHAVIORAL ANALYSIS (ABA) THERAPY IS "SPECIAL EDUCATION" RATHER THAN HEALTH CARE

INTRODUCTION

Plaintiffs bring this case on behalf of themselves and all similarly-situated active duty and retired members of the United States Armed Services, and their dependents ("military families"), entitled by federal law to receive certain health care benefits that Defendant Department of Defense ("DoD") has unlawfully denied them. The DoD, which administers the "Military Health Benefits Statute," 10 U.S.C. 55, has a policy that Applied Behavior Analysis ("ABA") therapy for autism spectrum disorder ("ASD" or "autism") is not medically necessary health care or mental health care, but rather it is "special education" and, therefore, is excluded from the nation's military health benefit plans' ("TRICARE") Basic program coverage pursuant to the "special education" exclusion found in 10 U.S.C. 1079(a)(9). Based on its unlawful policy that ABA therapy is "special education," DoD refuses to pay for ABA therapy, the most effective medical treatment for autism. As a result, thousands of members of the military who have children with autism cannot afford to pay for the most potent treatment for autism.

In fact, ABA therapy is not "special education" for purposes of the Military Health Benefits Statute. "Special education" refers to tailored academic instruction that, unlike ABA therapy, is *not* medically necessary, and that, unlike ABA therapy, schools provide for children at no cost to parents.

Under the Military Health Benefits Statute, ABA therapy is medically necessary "health care," which includes "mental health care." 10 U.S.C. 1072(10). It is psychotherapy that remediates the symptoms of a mental illness. Accordingly, it is a benefit to which the class of beneficiaries with autism are entitled under the TRICARE Basic program – the package of benefits available to all military families and that covers medically necessary services, including psychotherapeutic interventions.[1] ABA therapy is an intensive, extremely detailed and

[1] By law, the TRICARE Basic program covers all medically necessary health care and mental health care, unless the care is specifically excluded by the Military Health Benefits

enormously nuanced psychotherapeutic intervention. With virtual unanimity, physicians, psychiatrists, psychologists, social workers and mental health professionals regard ABA therapy to be (1) the most effective treatment for autism, (2) far more effective than the next most effective set of autism treatments, and (3) far more reliably supported by scientific research than any other autism treatment. (See accompanying Statement of Material Facts, Part II).

DoD's policy that ABA therapy is "special education" for purposes of the Military Health Benefits Statute is "not in accordance with law." The policy must, therefore, be "set aside," pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2).[2] A straightforward interpretation of the phrase "special education," placed in its statutory, regulatory, and historical context, demonstrates that it does not include ABA therapy. ABA therapy is health care and mental health care and is not "special education" for, *inter alia*, the following reasons:

- The scientific consensus, according to experts, studies, judicial findings, and the DoD's own internal documents and public statements, is that ABA therapy is medically and psychologically necessary health care for children with autism. Medically necessary health care is covered under the TRICARE Basic program.

- The text and legislative history of the "special education" exclusion reveal that the exclusion denotes educational services that are not medically necessary, unlike ABA therapy.

- ABA therapy is not "special education" within the plain meaning of DoD's regulations defining "special education" and incorporating by reference the

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Statute. One such exclusion is "special education, except when provided as secondary to active psychiatric treatment on an institutional basis." 10 U.S.C. 1079(a)(9). With the exception of deductibles and co-pays, federal law requires DoD to pay for all medically necessary health care of TRICARE Basic program beneficiaries without limit. 10 U.S.C. 55; 10 U.S.C. 1079(b)(5); 10 U.S.C. 1086(b)(4); see also 32 C.F.R. 199.4(a)(1)(i).

[2] The APA also provides that agency action that is "arbitrary and capricious" shall be held unlawful and set aside. 5 U.S.C. 706(2). Once Defendants produce the administrative record or this Court requires the production of the administrative record, and the true administrative record is before the parties and the Court, Plaintiffs will file a second motion for summary disposition alleging that the lack of support in the administrative record reveals that Defendants' actions and conclusions are "arbitrary and capricious." See, e.g., *Bishop v. Office of Civilian Health & Medical Programs of the Uniformed Servs.*, 917 F. Supp. 1469, 1476 (E.D. Wash. 1996) (Arbitrary and capricious to deny medical benefits because "CHAMPUS ignored substantial evidence that [treatment] is accepted within the medical community . . . . CHAMPUS' denial of benefits has no rational connection to the underlying facts.").

definition of "special education" under the Individuals with Disabilities Education Act and its regulations implemented by the U.S. Department of Education.

- ABA therapy is not "special education," because it is not part of the "free and appropriate" special education obligation of schools under the Individuals with Disabilities Education Act, as interpreted by the Supreme Court.

- The rules, licensing, practices, and education for ABA therapy professionals are distinct from those applicable to special education teachers.

- The U.S. Supreme Court insists that statutes, like the Military Health Benefits Statute, that confer benefits on members of the Armed Services, must be liberally construed in favor of the beneficiaries.

- A stingy interpretation that excludes the most potent treatment for autism, under a statute pursuant to which Congress commands DoD to provide premium health care to military families, is contrary to the core purposes of the statute.

Plaintiff military families, therefore, move the Court to make a purely legal determination that ABA therapy is not "special education" for purposes of the Military Health Benefits Statute and hold unlawful and set aside DoD's unlawful policy.[3] 5 U.S.C. 706. Plaintiffs request summary judgment on Count III of the Complaint alleging violations of 5 U.S.C. 706, in the form of an Order vacating Defendants' policy that ABA therapy is "special education" under the Military Health Benefits Statute with the instruction that DoD shall immediately provide TRICARE Basic benefits for ABA therapy and shall reimburse the military families for all wrongfully denied benefits. (Ex 1, *Proposed Order*).[4]

If the Court sets aside DoD's policy, determining that ABA therapy is not "special education," there is no reason for remand or further consideration by the DoD, because the agency has no discretion to withhold benefits for medically necessary care. See, e.g., 10 U.S.C.

[3] With Defendants seeking a remand to delay the resolution of this case, the parties filing dueling motions regarding production of the administrative record, and with pending motions on other matters, the Court can resolve this case by ruling on this purely legal question before addressing any other pending motion.

[4] Meanwhile, the Court should rule on Plaintiffs' Motion for Class Certification before deciding the instant Motion for Summary Disposition and/or deciding this case on the merits, for all of the same reasons against delaying a ruling on class certification that Plaintiffs discussed in their recently filed Memorandum in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Hold this Action in Abeyance.

1099(c) ("A health care plan designated by the Secretary of Defense . . . shall provide all health care to which a covered beneficiary is entitled under this chapter."); see also 10 U.S.C. 1071, 1072, 1074, 1076, 1077, 1079, 1086 and 32 C.F.R. 199.2 and 199.4. The Court should, therefore, vacate DoD's policy without remanding, because only one policy different than the current policy is possible. Either ABA therapy is "special education" or it is not. *Fogg v. Ashcroft*, 254 F.3d 103, 111-112 (D.C. Cir. 2001) ("In the face of such legal error, we would normally remand to the court for remand to the agency, but we do not do so when, as here, remand would be futile. 'Only one conclusion would be supportable.'), quoting *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984). In the event the Court orders a remand, any such order should instruct DoD to adopt a replacement policy/rule regarding ABA therapy that is in accordance with the Court's finding that ABA therapy is not "special education" for purposes of the Military Health Benefits Statute.

FACTS

Plaintiffs' **Statement of Material Facts**, accompanying Plaintiffs' Motion pursuant to LCvR 7(h), is incorporated by reference into this Statement of Points and Authorities. Plaintiffs' Statement of Material Facts contains **background information** that is of **vital importance** to Plaintiffs' Motion and to this Statement of Points and Authorities.[5] The remainder of this Statement of Points and Authorities relies upon the accompanying Statement of Material Facts.

STANDARD OF REVIEW

I. Summary Judgment Pursuant to FRCP 56

Under FRCP 56, summary judgment is appropriate when the pleadings and the "disclosure materials on file . . . show that there is no genuine issue as to any material fact and

[5] For a description of all of Plaintiffs' claims, including those which cannot be resolved on a motion for summary judgment/motion to vacate at this point (in part because of Defendants' refusal to produce the administrative record upon which its challenged policies are based), Plaintiffs refer the Court to the Complaint. The Complaint filed in this case is extraordinarily detailed; it has a table of contents for ease of reference; and it is written in a literary style.

that the movant is entitled to judgment as a matter of law." FRCP 56(c)(2). The opposing party's response must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. FRCP 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the non-movant fails to point to "affirmative evidence" showing a genuine issue for trial, or "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 257 (1986).

Here, there is no genuine issue as to any material fact. There is no dispute as to *what* ABA therapy is. There is no dispute that DoD claims that ABA therapy is "special education." Plaintiffs' motion asks the Court to resolve a legal question of statutory interpretation – whether ABA therapy is "special education" for purposes of 10 U.S.C. 1079(a)(9). Plaintiffs are entitled to summary judgment as a matter of law, because DoD's policy is contrary to law and, therefore, must be set aside, pursuant to the APA.

II. Judicial Review of DoD's Policy Pursuant to the APA

Judicial review of DoD's policy is governed by the standards set forth in the APA. 5 U.S.C. 706. To the extent necessary, "the reviewing court shall decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706. "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with the law." 5 U.S.C. 706(2)(A). Here, DoD's policy that ABA therapy is "special education" is not in accordance with the law, and, therefore, must be held unlawful and set aside by the Court.

ARGUMENT

I. DoD's Policy Regarding ABA Therapy Is Not Entitled to *Chevron* Deference

During judicial review of an agency's construction of a statute which the agency

administers, "if . . . 'Congress has directly spoken to the precise question at issue,' [the court] must give effect to Congress's 'unambiguously expressed intent.'" *Beverly Health & Rehab. Servs. v. Nat'l Labor Relations Bd.*, 317 F.3d 316, 321 (D.C. Cir. 2003), quoting *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). If a court, after employing "the traditional tools of statutory construction," concludes that a statute is unambiguous, "that is the end of the matter": the court must reject an agency's interpretation that is inconsistent with congressional intent. *Chevron*, *supra* at 842-843. The statute here is unambiguous in light of its legislative history, its internal structure, its administration, the regulations promulgated under it, its relationship to other statutes, and canons of construction.

This case is about the plain meaning of the words of the Military Health Benefits Statute. It is crystal clear that Congress did not intend the words "special education" in the section 1079(a)(9) "special education exclusion" to include within its ambit a medically and psychologically necessary, intensive, enormously detailed and nuanced psychotherapeutic intervention like ABA therapy, which is designed, supervised, and performed by highly trained and skilled ABA therapy professionals and not by special education professionals.

DoD misrepresents (or, more generously, misinterprets) the words "special education" to include ABA therapy, because DoD wants to divert resources from military families' health benefits to other DoD functions and programs. This unlawful misrepresentation of the statute is entitled to no deference. The Court must enforce the intent of Congress when, as here, the enacted language of the statute, its legislative history, its internal structure, its administration, the regulations promulgated under it, its relationship to other statutes, and the canons of statutory construction cumulatively constitute an unambiguous expression of that intent.

Furthermore, the U.S. Supreme Court instructs reviewing courts, in their *Chevron* Step One analysis, not to interpret statutory phrases "in isolation," because "the meaning or ambiguity

of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Instructed thus by the Supreme Court, courts reviewing agency action engage in a wide-ranging inquiry to determine if Congress has provided a clear or "unambiguous" answer to the question of statutory interpretation that confronts them. Reviewing courts, therefore, look at a wide range of evidence to determine whether the legislative intent regarding a contested agency interpretation of statutory language is clear or ambiguous. The *Chevron* Court instructs reviewing courts to draw on all of the "traditional tools of statutory construction." *Supra* at 843 n. 9. The *Chevron* Court itself considers the legislative history of the Clean Air Act at length. *Supra.* Since *Chevron*, the Supreme Court has examined the statutory text, its purposes, the broader statutory and regulatory schemes in which the contested provision is located, dictionary definitions, common usage, and technical meaning of statutory language, as well as the canons of statutory construction.

The phrase "special education," as used in the Military Health Benefits Statute, *unambiguously* does not apply to ABA therapy. Because there is no ambiguity, DoD's policy is not entitled to *Chevron* deference.[6] Even if the statute were ambiguous, which it is not, and some degree of deference applied, DoD's interpretation of "special education" would only be entitled to the most minimal, non-*Chevron* deference, because DoD adopted its policy through an informal process. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Where an agency's interpretation of a statute is offered through an informal medium – such as an opinion letter, policy statement, agency manual, or enforcement guideline – and is the product of informal, non-transparent decisional processes as opposed to formal adjudication or notice-and-comment rulemaking, *Chevron*-style deference is not warranted, and the court applies

[6] If a statute is ambiguous, which the "special education" exclusion in the Military Health Benefits Statute is not, a court may give effect to an agency's interpretation if based on a "permissible construction" of the statute. *Chevron*, *supra* at 843.

the minimally deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Christensen, supra* at 587 (Interpretations such as an opinion letter issued by a division of the Department of Labor "do not warrant *Chevron*-style deference."); *Mead, supra* at 234 (U.S. Customs Service ruling letters, and interpretations such as those "in policy statements, agency manuals, and enforcement guidelines" are "beyond the *Chevron* pale."). See also *American Fed'n of Gov't Employees v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) (holding that the model meat inspection program at issue there had "no more status than opinion letters, policy statements, agency manuals, and enforcement guidelines, all of which are undeserving of *Chevron* deference"). Under minimal *Skidmore* deference, an agency's statutory interpretation is at best "eligible to claim respect" only "according to its persuasiveness." *Mead, supra* at 221; *Christensen, supra* at 587 (Such agency interpretations are entitled to respect only to the extent that those interpretations have the "power to persuade."); *Skidmore, supra* at 140.

II. The Supreme Court Insists that Statutes, Like the Military Health Benefits Statute, that Confer Benefits on Members of the Armed Services, Must Be Liberally Construed In Favor of the Beneficiaries

The Supreme Court has repeatedly held that laws that confer benefits to members of the Armed Services must be construed generously in favor of the nation's servicemen and women. The jurisprudence of the Supreme Court clearly requires a court confronted with competing interpretations of a statute to press a heavy interpretive thumb down on the side of the scale that favors military families and those who have sacrificed for the nation.

In the Court's review of DoD's policy, the statutory provisions at issue must, therefore, be liberally construed in *favor* of the military families, because the statute at issue concerns the provision of benefits to members of the Armed Services. As stated time and again by the Supreme Court, it is a well-accepted substantive "canon [of construction] that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*

v. St. Vincent's Hosp., 502 U.S. 215, 221 n.9 (1991), citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . [We] construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."). See also *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran."); *Schaller v. Board of Education*, 449 F. Supp. 30, 32 (N.D. Ohio 1978) ("The statute should be liberally construed so as to benefit those who have served their country.").

In *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980), the Supreme Court, therefore, construed the Vietnam Era Veterans' Readjustment Assistance Act "for the benefit of the returning veteran" and held that, for purposes of employment seniority, upon returning from military service the veteran steps back on the seniority escalator at the precise point he would have occupied had he kept his position continuously during his service. *Id.* at 193-195. The plaintiff alleged that his prior employer, a steel company, refused to consider his military service time in computing the amount of supplemental unemployment benefits to which the plaintiff was entitled under a collective bargaining agreement between the steel company and the United Steelworkers union. *Id.* at 193-194. In *Coffey* (and the cases below), the Supreme Court adopts a liberal construction of military benefits laws in favor of the beneficiaries even when that liberal construction imposes burdens on private sector employers and infringes on the sanctity of freedom of contract between labor and management. Surely, then, Congress intends that military benefits laws should be liberally construed in favor of the beneficiaries when, as in the instant

case, no private person or company will be burdened, but only the government itself will "endure" a generous construction of the statutory obligation it authored in favor of the beneficiaries it intends to benefit.

Likewise, in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the United States Supreme Court construed a provision of the Veterans' Reemployment Rights Act in favor of the plaintiff military member and held that the Act does not implicitly limit the length of military service after which a member of the Armed Services retains a right to civilian reemployment. *Id.* at 216. When a private employer refused to grant re-employment following a serviceman's 3-year leave of absence from his job because it considered the duration unreasonable, the Court found that the absence of any limitation on duration was unequivocal in that the text of the statutory provision "places no limit on the length of a tour after which [the veteran] may enforce his reemployment rights." *Id.* at 222. Similarly, in the instant case, Congress places no limits on the size of the DoD's obligation to pay for medically necessary "mental health care" against which the military family may enforce their health benefits rights. As the Supreme Court did in *King*, this Court should, therefore, enforce the statutory provisions in favor of the military families who have dependents with autism.

Federal district courts have reached similar results based on the same reasoning. In *Schaller v. Board of Education,* 449 F. Supp. 30 (N.D. Ohio 1978), for example, the court construed the Vietnam Era Veterans' Readjustment Assistance Act in favor of a plaintiff military veteran who had voluntarily left her employment as a teacher to enlist in the Armed Services. She sought damages against the school district that prevented her return to her previous position. Holding that "[t]he statute should be liberally construed so as to benefit those who have served their country," the court even stated that "the principles of comity and federalism which underlie the relationship between the states and the national government have less significance in the area

of Congress' authority to raise and support armies." *Id.* at 33. The court further stated that "the fact that another employee had been hired to fill the veteran's old job is immaterial," and "[t]he rights of the veteran cannot be set aside by an agreement between the employer and a third party." *Id.* In other words, the court held that even (1) federalism values, (2) respect for the autonomy of a local school district, and (3) the free-market contract rights and interests in job security of non-military employees are trumped by the transcendent purpose of military benefits statutes – to *support* members of the Armed Services and to raise armies. In the instant case, no competing concerns of a similar substantial nature exist. The balance of the Court's interpretative judgment in the instant case must, therefore, weigh more heavily in favor of a generous construction in support of the beneficiaries than in *Schaller*. The purpose of military benefits statutes to *support* members of the Armed Services and to raise armies is certainly furthered by providing coverage for vital ABA treatment for military beneficiaries with autism.

Congress is deemed to enact statutory language based on an understanding of interpretive principles like the "military beneficiaries" canon of statutory construction. The Supreme Court stated in *King v. St. Vincent's Hospital*, 502 U.S. 215 n.9 (1991), in regard to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor . . . [w]e will presume congressional understanding of such interpretive principles." See also *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 898 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). As the Court interprets the Military Health Benefits Statute, it must, therefore, keep in mind that Congress wanted the Court to construe the provisions of the statute in favor of its beneficiaries. Congress surely did not intend for a crabbed and selfish construction of language to deprive children from military families of their best hope for at least a partial cure of the symptoms of a devastating disease.

III. DoD's Refusal to Pay for the Most Effective Treatment for Autism Is Contrary to the Core Purposes of the Military Health Benefits Statute

The statutory provisions at issue should be construed to effectuate the purposes of the Military Health Benefits Statute. As declared by Congress: "**The purpose** of this chapter is to create and maintain high morale in the uniformed services by providing an **improved program** of medical . . . care for members and certain former members of those services, **and for their dependents**." 10 U.S.C. 55 1071 (emphasis added). Congress decided that military personnel, active duty and retired, deserve a premium level of medical care. The TRICARE Basic program is a key component to maintaining the quality of life for the men and women of the armed forces who put their lives at risk to serve this Country every day, as well as their dependents. A stingy interpretation of Basic coverage to exclude the most potent health care treatment for autistic children, under a statute pursuant to which Congress commands DoD to provide premium health care for military families, is contrary to the core purposes of the Military Health Benefits Statute.

In light of the declared purposes of the statute, Congress did not intend the "special education" exclusion to eliminate the most, and perhaps only, effective treatment for autism. A conclusion that ABA therapy is not excluded as "special education" from Basic coverage is in harmony with the "design of the statute as a whole and . . . its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The D.C. Circuit has recognized that a strong judicial check on agency action is necessary to ensure that federal agencies remain true to their stated, statutory mission: "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). DoD should not be permitted, through its unlawful interpretation of "special education," to trample on the important legislative purposes of the benefits statute.

The D.C. Circuit rejected a very similar, overly stingy DoD interpretation of the "custodial care" exclusion to the Military Health Benefits Statute that, as in the instant case, denied TRICARE Basic program benefits to a military family, because DoD's interpretation was contrary to the stated purposes of the statute. In *Barnett v. Weinberger*, 818 F.2d 953 (D.C. Cir. 1987), wherein a military dependent suffered from a disabling neurological disorder, the D.C. Circuit held that DoD's regulation defining the child's treatment as "custodial care," which is excluded from Basic program coverage, violated the statutory scheme. Like DoD's attempt to exclude the child's treatment in *Barnett* as "custodial care," DoD's present attempt to exclude ABA therapy as "special education" should be overruled and no judicial deference given. As held by the *Barnett* court:

> [T]he regulations' broad-gauged reading of the statutory exclusion is **antithetical to the general statutory purpose, for the prime objective** of the [Military] Dependents' Medical Care Act **was enhancement, not reduction, of the benefits to be accorded to military personnel and their dependents.** Against this backdrop of congressional intent, it seems highly incongruous that the scope of a statutory exclusion from benefits should be expanded[.]

Id. at 963 (emphasis added). In reaching this conclusion, the *Barnett* court traced the legislative history and purpose behind enactment of the Military Health Benefits Statute, including the substandard health care that historically was available to military families:

> The dependent-care practices long pursued in military circles, however, left much to be desired. Positive statutory authority to accommodate dependent medical service was fragmentary; this bred disparities in the types of care afforded and the categories of dependents able to seek them. Moreover, an estimated 40 percent of dependents could not obtain medical care in military facilities, primarily because of overcrowding, physician shortages, or residence outside the areas served by those facilities. **Inadequacies of these sorts in the dependent medical care system in vogue generated what ultimately came to be recognized as "one of the most serious morale problems facing our Armed Forces."**

Id. at 956-957 (emphasis added).

"Congress passed the Dependents' Medical Care Act as the means of rectifying these shortcomings." *Id.* at 957. Specifically, the passage of the Military Health Benefits Act was

intended to benefit the *dependents* of military personnel, like the autistic children here: "The truly outstanding feature of the Dependents' Medical Care Act, however, is that it converted the provision of military-dependent medical care from a mere act of grace to a full-fledged matter of right." *Id.* Thus, the D.C. Circuit in *Barnett* recognized that military dependent health care is a "matter of right" that DoD cannot diminish by employing an overly restrictive interpretation of Basic program coverage.

In rejecting DoD's interpretation of the "custodial care" exclusion, the *Barnett* court also recognized that DoD's interpretation on an issue of statutory construction "depends upon . . . its compatibility with the general purposes that motivated enactment of the legislation interpreted." *Id.* at 962-963. "[W]e would neglect a fundamental responsibility were we to 'stand aside and rubber-stamp [our] affirmance of administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute.'" *Id.* at 964.

IV. ABA Therapy Is Medically Necessary "Health Care" and "Mental Health Care" to which the Military Families are Entitled under the TRICARE Basic Program

By law, the TRICARE Basic program covers all medically necessary health care, unless the care is specifically excluded by the Military Health Benefits Statute, 10 U.S.C. 55. See 32 C.F.R. 199.4(a)(1)(i).[7] As defined by the statute, "the term 'health care' includes mental health care." 10 U.S.C. 1072(10). ABA therapy is medically necessary "mental health care," under section 1072(10) – "to which a covered beneficiary is entitled" and which DoD "shall" provide pursuant to section 1099(c) and multiple other sections of 10 U.S.C. 55. See also sections 1071,

[7] "Scope of benefits. Subject to all applicable definitions, conditions, limitations, or exclusions specified in this part, the CHAMPUS **Basic Program will pay for medically necessary services** and supplies required in the diagnosis and treatment of illness or injury, including maternity care and well-baby care. Benefits include specified medical services and supplies provided to eligible beneficiaries from authorized civilian sources such as hospitals, other authorized institutional providers, physicians, other authorized individual professional providers, and professional ambulance service, prescription drugs, authorized medical supplies, and rental or purchase of durable medical equipment." 32 C.F.R. 199.4(a)(1)(i)(emphasis added).

1072, 1074, 1076, 1079, and 1086. See, e.g., *McHenry*, *supra* at 1235 ("J.M.'s pediatrician, Dr. Shah, has thrice written to PacificSource indicating that ABA treatment was **medically necessary** to treat J.M.'s autism . . . . PacificSource has not challenged J.M.'s diagnosis or Dr. Shah's opinion that ABA is a medically necessary treatment.") (emphasis added).

TRICARE regulations define the term "medically or psychologically necessary" as "[t]he frequency, extent, and types of medical services or supplies which represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and mental disorders[.]" 32 C.F.R. 199.2. Meanwhile, TRICARE regulations provide that, for purposes of Basic program coverage, "the term 'medical' should be understood to include 'medical, psychological, surgical, and obstetrical,' unless it is specifically stated that a more restrictive meaning is intended." 32 C.F.R. 199.2. Thus, in the interpretation of the Military Health Benefits Statute, because "medical" includes "psychological," the concepts of "medical care" and "medical condition" necessarily include "psychological care" and "psychological condition."

Moreover, the TRICARE regulation above includes "mental disorders," of which autism is one, under the umbrella of "medical care." 32 C.F.R. 199.2. Likewise, TRICARE regulations provide that the term "medical" is that which "pertains to the diagnosis and treatment of illness, injury, pregnancy, and *mental disorders* by trained and licensed or certified health professionals. 32 C.F.R. 199.2 (emphasis added). TRICARE regulations define "mental disorder," for purposes of Basic program coverage, as "a nervous or mental condition that involves a clinically significant behavioral or psychological syndrome or pattern that is associated with a painful symptom, such as distress, and that impairs a patient's ability to function in one or more major life activities. Additionally, the mental disorder must be one of those conditions listed in the DSM-III." 32 C.F.R. 199.2. TRICARE regulations also provide that, in order for "treatment of

a mental disorder to be medically or psychologically necessary, the patient must, as a result of a diagnosed mental disorder, be experiencing both physical or psychological distress and an impairment in his or her ability to function in appropriate occupational, educational or social roles." 32 C.F.R. 199.4(c)(2)(ix). Autism involves a significant behavioral or psychological syndrome or pattern, and causes not only significant physical and psychological distress, but also significant impairment of a child's ability to function in appropriate and major life activities. See, e.g., *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d 1226, 1230 (D. Or. 2010) ("Autism is a neurobiological disorder that affects a child's development by severely limiting his or her ability to interact with others."), citing July 2007 DoD Report and Plan on Services to Military Dependent Children with Autism. Further, autism is a mental disorder listed in the DSM-III, and each putative class member has been diagnosed with autism by a physician.

ABA therapy is "medically necessary," because the therapy involves precisely the frequency, extent, and type of medical service which represents "appropriate medical care" for treating autism. See 32 C.F.R. 199.2. ABA therapy is widely accepted by qualified professionals and experts in the field to be the most, if not the only, effective treatment for the mental disorder of autism. Even DoD itself, when approving limited ECHO benefits for autistic children of active duty military personnel, has stated that ABA therapy is "medically necessary." (Ex 11, *ABA Therapy Approval Under ECHO*).

TRICARE regulations define "appropriate medical care" as "services performed in connection with the diagnosis or treatment of disease or injury, pregnancy, mental disorder, or well baby care which are in keeping with the generally accepted norms for medical practice in the United States." 32 C.F.R. 199.2. As stated, autism is a "mental disorder," and the wide acceptance of ABA therapy as the preferred method of treatment for autism shows that it is within the generally accepted norms for medical practice in the United States.

TRICARE regulations also define "appropriate medical care" as services performed by an "authorized individual professional provider rendering the medical care [who] is qualified to perform such medical services by reason of his or her training and education and is licensed or certified by the state where the service is rendered or appropriate national organization or otherwise meets the CHAMPUS standards." 32 C.F.R. 199.2. ABA therapy is performed by qualified, trained, professional providers possessing required licenses or certifications, including, according to DoD's own standards: a provider with a current, unrestricted state-issued license to provide ABA services or certificate as a provider of ABA services; a provider certified by the Behavior Analyst Certification Board as either a Board Certified Behavior Analyst or a Board Certified Assistant Behavior Analyst where such state-issued license or certification is not available; or, subject to certain conditions, a Corporate Services Provider that employs one or more of the above individual providers. TRICARE Operations Manual 6010.56-M, ch. 18, sec. 9.

Specifically, the treatment of autism by ABA therapy falls into at least three categories of "health care" or "mental health care" provided as a Basic program benefit under the Military Health Benefits Statute:

- The treatment of a "medical condition," pursuant to 10 U.S.C. 1077(a)(4);
- The treatment of a "nervous, mental, and chronic condition," pursuant to 10 U.S.C. 1077(a)(5); and
- A "rehabilitative therapy to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of the patient when prescribed by a physician," pursuant to 10 U.S.C. 1077(a)(17).

First, as explained above, the term "medical" includes "psychological" and relates to the treatment of "mental disorders." See 32 C.F.R. 199.2. Thus, ABA therapy treats a "medical condition." Second, for the same reasons, ABA therapy treats a "mental condition." Third,

ABA therapy is also a rehabilitative therapy[8] to improve or prevent deterioration of function and is prescribed by a physician.

ABA therapy is no less medically necessary than other medical supports such as speech and occupational therapies, which not only are provided in the academic environment but *are* covered as health care by the TRICARE Basic program. While simultaneously denying Basic program coverage for ABA therapy, DoD even states that speech and occupational therapies are covered Basic benefits for the treatment of autism. "For children with autism, the TRICARE basic program covers services such as physician office visits, immunizations, and interventions such as speech therapy, physical therapy, and occupational therapy." (Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p. 9). However, speech and occupational therapies alone are nowhere near adequate medical treatment for autistic children; ABA therapy is required. As stated by military leaders in a letter to the Assistant Secretary of Defense for Health Affairs dated May 25, 2007, "There are various symptomatic treatments for autism, such as speech therapy, occupational therapy, and certain medications, but none of these have the impact of comprehensive Applied Behavior Analysis (ABA)." (Ex 22, *Letter to Assistant Secretary of Defense for Health Affairs dated May 25, 2007, encl. 2, p. 2*). There is no lawful reason for not including ABA therapy as a "medical" treatment contemplated by the Basic program, alongside speech and occupational therapies.

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[8] Analogous case law in the Medicaid context demonstrates that ABA therapy is "rehabilitative." For example, in *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 905 (S.D. Ohio 2008), *aff'd*, 339 Fed. Appx. 542 (2009), the court held that ABA therapy is a "rehabilitative," medically necessary service for purposes of federal reimbursement. Rejecting the defendant's argument that ABA therapy does not "restore" any skills that the child previously had, the court found that ABA therapy was "rehabilitative" because "ABA therapy, when recommended by a licensed practioner of the healing arts, is a medically necessary service which provides the maximum reduction of a mental or physical disability." *Id.* at 916-917.

See also *Pediatric Specialty Care Inc. v. Ark. Dept. of Human Services,* 443 F. 3d 1005 (8th Cir. 2006) (State required to provide early intervention behavioral treatment to children under the EPSDT mandate because such treatment was rehabilitative, even though it applied to young children who presumably were not being "restored" to a prior ability.).

Accordingly, ABA therapy is a benefit to which the military families are entitled under the TRICARE Basic program. ABA therapy is medically necessary health care that is proven safe and effective and considered the standard of care in the United States.

V. The Application of the Traditional Tools of Statutory Construction to the Text of the Military Health Benefits Statute Yields the Plain, Clear Meaning of that Text: ABA Therapy Is "Medically and Psychologically Necessary" "Health Care" and "Mental Health Care" and Is Not "Special Education"

This dispute centers on DoD's unlawful policy that interprets the "special education" exclusion in 10 U.S.C. 1079(a)(9) to include ABA therapy. DoD's policy is invalid, not in accordance with the law, and should be set aside. 5 U.S.C. 706(2). A straightforward analysis of the applicable statutes, regulations, and the nature of ABA therapy itself demonstrates that ABA therapy is not "special education" under section 1079(a)(9). This "is a pure question of statutory construction for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Under *Chevron* Step One, the DoD's disputed actions are not entitled to any deference because the disputed statutory provision is unambiguous – "special education" clearly does not include ABA therapy. In other words, the Court must reject the agency's statutory interpretation, because it is inconsistent with congressional intent. *Chevron*, *supra* at 842-843. If, for purposes of argument, we assume that the disputed statutory provision is ambiguous, thereby triggering *Chevron* Step Two, the only deference owed to the DoD is minimal *Skidmore* deference. However, because DoD's interpretation is without "persuasiveness," DoD's policy fails here as well. DoD's policy that ABA therapy is statutorily excluded "special education" is, therefore, contrary to law, under any of the standards of judicial review that inhabit the spectrum of scrutiny that courts may apply to agency action.

A straightforward interpretation of the "special education" exclusion, in context and applying the "traditional tools of statutory construction," reveals that ABA therapy does not fall within the meaning of "special education." This conclusion is supported by numerous

interpretive considerations, including the plain meaning and internal structure of the statutory language, the legislative history, DoD and U.S. Department of Education regulations, and the canons of statutory construction.

A. Governing Statutory and Regulatory Background

The "Military Health Benefits Statute" was originally passed into law, and the TRICARE program was established, pursuant to the Dependents' Medical Care Act, Pub. L. 84-569 (1956), now codified at 10 U.S.C.1071 *et seq.* Under the Military Health Benefits Statute, "special education" is excluded from TRICARE Basic health coverage outside of a military treatment facility (except when provided as secondary to active psychiatric treatment on an institutional inpatient basis). 10 U.S.C. 1079(a)(9). The Military Health Benefits Statute itself does not define the phrase "special education."

The "special education exclusion" was first passed into law in the 1976 Department of Defense appropriations bill, wherein Congress listed five types of "not medically or psychologically necessary" services excluded from the Basic health benefits program of the Military Health Benefits Statute. Pub. L. 94-212, sec. 751 (1976) (Ex 24). Ultimately, in the 1985 Department of Defense appropriations bill, Congress amended section 1079(a) of the Military Health Benefits Statute, and added the "special education exclusion." Pub. L. 98-525, Title XIV, sec. 1401 (Ex 25).

While "special education" is excluded from the TRICARE Basic program, "special education" is covered under the TRICARE Extended Care Health Option ("ECHO"). 10 U.S.C. 1079(e)(3). The ECHO program, created by the National Defense Authorization Act for Fiscal Year 2002, is only for *active* duty members of the uniformed services, and their dependents. 10 U.S.C. 1079(d). Retirees and their dependents are not eligible for ECHO coverage. In carrying out its unlawful policy and denying military families' claims for ABA therapy under the

TRICARE Basic program, DoD references its policy manual provision that defines "special education" for purposes of the ECHO program. (Ex 3, *Redetermination Denial for Z.B. dated June 18, 2007*). DoD claims that ABA therapy is "special education," TRICARE Policy Manual 6010.57-M, ch. 9, sec. 9, and is only available to ECHO beneficiaries and is subject to a $36,000 per year cap. DoD refuses to provide any ABA therapy coverage for dependents of retirees.

According to its plain terms, ECHO provides eligible beneficiaries with coverage for "special education as provided by the Individuals with Disabilities Education Act [("IDEA")] and defined at 34 C.F.R. 300.26 [sic - special education is defined at 34 C.F.R. 300.39, not 34 C.F.R. 300.26] and that is specifically designed to accommodate the disabling effects of the qualifying condition." 32 C.F.R. 199.5(c) (4). DoD, therefore, specifically relies upon and incorporates by reference in its ECHO regulations the definition of "special education" contained in the IDEA statute and IDEA regulations promulgated by the U.S. Department of Education.

B. The "Special Education Exclusion" was Passed Into Law Because Congress Deemed "Special Education" to Not be Medically Necessary

1. The Text of the Appropriations Bills Shows Congress's Intent

As stated above, the "special education exclusion" was first passed into law in a 1976 appropriations bill for the Department of Defense, wherein Congress listed five types of "not medically or psychologically necessary" services that would be excluded from funding under the Basic military health program. Pub. L. 94-212, sec. 751 (1976) (Ex 24). Specifically, Congress provided the following "Health program, restrictions" in the 1976 appropriations bill:

> None of the funds contained in this Act available for the Civilian Health and Medical Program of the Uniformed Services under the provisions of section 1079(a) of title 10, United States Code, shall be available for (a) **services of pastoral counselors, or family and child counselors, or marital counselors**, except when these services are certified as not being available on the military base to which the member is assigned, or when the recipient resides within 40 miles of a military medical facility which certifies that these services are not available; (b) **special education**, except when provided as secondary to the active psychiatric treatment on an institutional inpatient basis; (c) **therapy or counseling for sexual dysfunctions or sexual inadequacies**; (d) **treatment of obesity** when obesity is

> the sole or major condition treated; (e) **reconstructive surgery justified solely on psychiatric needs** including, but not limited to, **mammary augmentation, face lifts, and sex gender changes**; **or (f) any other service or supply which is not medically or psychologically necessary to diagnose and treat a mental or physical illness, injury, or bodily malfunction as diagnosed by a physician, dentist, or a clinical psychologist.**

Pub. L. 94-212, sec. 751 (1976) (Ex 24) (emphasis added).

In the very next appropriations bill for the Department of Defense, Congress excluded the same five types of services (i.e., family counseling, special education, sexual dysfunction, obesity, and plastic surgery) from funding under the Basic health program. Pub. L. 94-419, sec. 743 (1976) (Ex 26). Again, the list of excluded services concluded with the catch-all exclusion "or . . . any other service or supply **which is not medically necessary** to diagnose and treat a mental or physical illness, injury, or bodily malfunction as diagnosed by a physician, dentist, or a clinical psychologist." *Id.* (emphasis added).

Thus, in its foundational passage of the "special education exclusion," Congress intended to exclude only services that were "not medically necessary." That "not medically necessary" characteristic was common to the five excluded services, including the "special education exclusion," when those exclusions were first passed into law.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). As stated by the D.C. Circuit Court of Appeals: "Since, in the case at bar, several important factors seriously undermine the Secretary's interpretation of the statutory term . . . , we can discharge our obligation to ascertain the soundness of the disputed agency decision only by independent investigation and analysis of the statutory framework in light of the relevant legislative history." *Barnett v. Weinberger*, 818 F.2d 953, 964 (D.C. Cir. 1987) (DoD's interpretation of "custodial care" struck down because wrongfully denied benefits to military dependent with disabling neurological disorder). Here, at

least two compelling principles of statutory construction require the conclusion that "special education" was excluded from Basic program funding solely because it was deemed "not medically necessary."

First, the longstanding rule *noscitur a sociis* instructs that "a word may be known by the company it keeps." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Here, the common characteristic of the five excluded services, including the "special education" exclusion, when those exclusions were first passed into law, was the absence of medical necessity. Along with "special education," the services excluded from Basic program coverage were family counseling, counseling for sexual inadequacies, treatment of obesity when obesity is not caused by another condition, and reconstructive surgery such as breast enhancements, face lifts, or sex changes. Family and sexual counseling are not medically necessary services, when they do not treat a diagnosed medical condition or mental illness. Neither is losing weight simply when one is overweight, or enhancing one's breasts exclusively for cosmetic purposes, or otherwise superficially changing physical appearance. "Special education" was among these excluded services because, like all of them, it was not medically necessary.

In *Blue v. Bonta*, 99 Cal. App. 4th 980 (1st Dist. 2002), for example, the appellants sought to compel the state health department to pay for providing stairway chairlifts to medically indigent and disabled persons. The statute at issue contained a list of items constituting "durable medical equipment," such as wheelchairs and iron lungs. *Id.* at 989-990. The court reasoned:

> Under the principle of statutory interpretation known as noscitur a sociis (the term may be defined by reference to its fellow members of a class), we note that **the list of representative medical equipment includes items that are medically necessary**, and are not commonly used by persons except those suffering from a disabling medical condition.

Id. (emphasis added). Therefore, according to the court, "the use of the word 'medical' in the phrase 'durable medical equipment' was apparently intended to designate items that are

medically necessary," and a stairway chairlift qualifies as being medically necessary. *Id.* See also *Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

Here, the list of excluded services includes items that are *not* medically necessary, clearly intended so, and "special education" falls among these. However, ABA therapy *is* medically necessary, according to the uniform consensus of experts in psychiatry, psychology, medicine, and behavioral science and autism research and practice, as well as DoD's own public statements and internal documents. (See accompanying Statement of Material Facts, Parts II and III). Therefore, because "special education" was excluded from the Basic program because it is not medically necessary, and ABA therapy unquestionably *is* medically necessary, ABA therapy cannot be "special education."

Second, the D.C. Circuit routinely invokes the "reverse" *ejusdem generis* principle of statutory construction, which instructs that the broader category at the end of a statutory list defines the scope of the more specific example found among the statutory list. In other words, as explained by the D.C. Circuit Court of Appeals, "the phrase 'A, B, or any other C' indicates that A is a subset of C." *United States v. Williams-Davis*, 90 F.3d 490, 508-509 (D.C. Cir. 1996). In its original passage of the "special education exclusion," Congress listed five excluded services, separated only by semicolons, and concluded the list with the catch-all exclusion "**or any other service or supply which is not medically** [or psychologically] **necessary**." Pub. L. 94-212, sec. 751 (1976) (Ex 24); Pub. L. 94-419, sec. 743 (1976) (Ex 26) (emphasis added). According to the reverse *ejusdem generis* principle, each of the listed specific services, including "special education," is a subset of the broader category of "not medically necessary" services.

D.C. Circuit case law strongly supports this conclusion. In *Dong v. Smithsonian Institution*, 125 F.3d 877, 879-880 (D.C. Cir. 1997), for example, the court even found it

"unnecessary to address" whether the Smithsonian is a "government controlled corporation" according to "the plain terms of the phrase itself," because application of the reverse *ejusdem generis* rule answered the question. As stated by the court, the statute at issue identified "four specific categories – 'any executive department, military department, Government corporation, Government controlled corporation' – and then uses a catch-all phrase to encompass similar entities not precisely fitting any of the four specific molds: 'or other establishment in the executive branch.'" *Id.* The court held this meant that "Congress evidently viewed the four specified classes as examples of 'establishments in the executive branch,' so that an entity clearly outside the executive branch would not qualify even if it could otherwise be shoehorned into the concept of a 'Government controlled corporation.'" *Id.* Likewise, the specific categories of excluded services among which "special education" was included were examples of "not medically necessary" services or supplies. Pub. L. 94-212, sec. 751 (1976) (Ex 24); Pub. L. 94-419, sec. 743 (1976) (Ex 26). According to the *Dong* court, "[t]his is the most logical reading of the statute" – "the general term reflects back on the more specific[.]" *Id.* at 879-880, citing *United States v. Williams-Davis*, 90 F.3d 490, 508-509 (D.C. Cir. 1996).

The D.C. Circuit also applied the rule of reverse *ejusdem generis* in *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003). In *Safe Food*, the court analyzed the statutory definition of "solid waste" as "any garbage, refuse, sludge from . . . [an] air pollution control facility and any other discarded material." The petitioners argued that sludge from an air pollution control facility is included in the above definition of "solid waste," even if that sludge is not also "discarded." *Id.* In other words, the petitioners suggested that the catch-all phrase of "and any other discarded material" did *not* restrict the listed items to a meaning that fits within the catch-all category of discarded materials. The court, however, sided with the EPA's reading of the statute, which argued that "the phrase 'other discarded materials' should be read to mean

that the listed materials are solid waste only if they are also 'discarded.'" *Id.* Thus, the catch-all phrase at the end controlled the definition of the items in the list. As stated by the court, "[t]his reading is also sensible, as well as consistent with the 'reverse ejusdem generis' principle . . . under which "the phrase 'A, B, or any other C' indicates that A is a subset of C[.]" *Id.*, citing *Williams-Davis*, *supra* at 508-509 and *Dong*, *supra* at 879-880.

Numerous other courts throughout the country have applied the reverse *ejusdem generis* principle in similar circumstances, further supporting Plaintiffs' interpretation that "special education" is a subset of "not medically necessary" services or supplies. See, e.g., *United States v. Delgado*, 4 F.3d 780, 786 (9th Cir. 1992) ("[A] statute regulating fishing may state that licensed individuals may catch . . . 'bass, trout, or any other fresh water fish.' The limits would apply to fresh water bass, such as black bass, but not to sea bass, because the clause 'or any other fresh water fish' limits 'bass' and 'trout' to those in fresh water."); *Cochran, Fox & Co., Inc. v. Public Serv. Comm'n*, 603 N.W.2d 748 (Wis. Ct. App. 1999) (concluding that, when statute defines "transmission equipment and property" as "any conduit, subway, pole, tower, transmission wire or other equipment on, over or under any street or highway," the phrase "on, over or under any street or highway" further restricts meaning of specific terms to types of structural transmission equipment along or under public rights of way); *SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's*, 179 S.W.3d 619, 625 (Tex. App. 1st Dist. 2005) ("[T]he policy excludes only gradually occurring leakage, but not sudden leakage, because the phrase 'any other gradually occurring loss' limits the scope of 'Leakage' to that which is gradually occurring. That is, 'Leakage' is modified by, and a subset of, 'any other gradually occurring loss.'").

Several of the other cases employing the principle of reverse *ejusdem generis* rely on the D.C. Circuit cases. *Bristol-Myers Squibb Co. v. United States*, 48 Fed. Cl. 350, 358-359 (Fed. Cl. 2000) (Where first two phrases are followed by phrase "or otherwise constitute

infringement," the use of "otherwise" in the third phrase signals that "the first two phrases implicate circumstances in which infringement would occur." Plaintiff's interpretation of the language, relying on D.C. Circuit case *Dong*, *supra* and "the reverse of the interpretive maxim ejusdem generis," "is consonant with its plain meaning."); *NFL v. Vigilant Ins. Co.*, 2006 NY Slip Op 8197, 5-6 (N.Y. App. Div. 1st Dep't 2006) (Policy excluded numerous employment practices, "followed by a catchall provision that further excludes any claim for 'violation of any other federal, state, local or common law, statute, ordinance, rule or regulation or any public policy relating to employment or employees.'" Court agreed with NFL's interpretation relying "on the principle of statutory construction known as 'reverse ejusdem generis'" and citing D.C. Circuit case *Safe Food*, *supra*, that the "excluded employment practices must be interpreted in light of the limiting language of the catchall provision.").

Here, the plain language of the appropriations bills placed "special education" in a list of excluded services and ended the list with the catch-all exclusion of "any other" services that are "not medically necessary." Pub. L. 94-212, sec. 751 (1976) (Ex 24); Pub. L. 94-419, sec. 743 (1976) (Ex 26). "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). According to the principle of reverse *ejusdem generis* that is followed in the D.C. Circuit, Congress intended that "special education" includes within its meaning only services that are not medically necessary. If a treatment is medically necessary, it is not "special education," but rather it is a health care or mental health care treatment. ABA therapy is health care that treats the mental disorder of autism, and the evidence of its medical necessity is overwhelming. (See accompanying Statement of Material Facts, Part II). Medically necessary

ABA therapy, therefore, cannot be "special education."

2. The Legislative Record Shows that Congress Considered "Special Education" to be Distinct from Medical Care like ABA Therapy

An excerpt from the House Report for the 1976 appropriations bill (which first enacted the "special education exclusion") supports the conclusion that Congress excluded "special education" from the health benefits for military families that DoD was obligated to pay, because special education was deemed "not medically necessary," as well as a discipline that was distinct from the field of medicine altogether. To support the exclusion of "special education" from Basic health care coverage, the House Report reasoned: "Education is an entire field of its own and **not at all** a part of the field of medicine." H. Rep. 94-517 (1975) (emphasis added). In other words, not only did Congress deem special education to refer to interventions that are not medically necessary, but Congress deemed special education to belong to a field of practice (education) entirely distinct from the field of medicine. Because medical practice, according to the House Report, in no way overlaps with special education, the treatment of a mental disorder by a medically necessary therapy is entirely distinct from a special education. For purposes of the Military Health Benefits Statute, Congress intends for medicine and education to be mutually exclusive fields of practice. What is education cannot be medicine, and vice versa.

Medically necessary, mental health care like ABA therapy, therefore, cannot be excluded from Basic coverage on the theory that it is "special education." See, e.g., *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 626 (D.C. Cir. 1983) ("The legislative history supports this plain meaning interpretation of the statute." The House Report reveals the "clear statutory mandate."). Medically necessary, mental health care belongs to the field of "medicine," as defined by the Military Health Benefits Statute and DoD's own regulations. See, e.g., 10 U.S.C. 1072(10) ("the term 'health care' includes mental health care"); 32 C.F.R. 199.2 ("medical care" includes "mental disorders"). Because (1) ABA therapy belongs to the field of

medicine,[9] and (2) Congress did not intend to exclude such medically necessary, health care treatments belonging to the field of medicine when it enacted the "special education exclusion," Congress did not intend to exclude ABA therapy pursuant to that exclusion.

In *Woods Psychiatric Institute v. United States*, 20 Cl. Ct. 324 (Cl. Ct. 1990), the court discussed the "special education exclusion" in the Military Health Benefits Statute, and DoD's attempt to recoup from a provider "routine educational costs" and other "educational costs." *Id.* at 329. The court noted that "an examination of the various types of health care that may be provided, 10 U.S.C. § 1077, reveals a common denominator--medical care. . . . Providing educational services is not ordinarily connected to medical care, unless in a rehabilitative or therapeutic context, and in that situation, would be conducted by a medically trained professional." *Id.* Thus, the court characterized "medical care" as distinct from "educational services," and if "educational" services are provided in a rehabilitative or therapeutic context by a medical professional, such services are medical care. Here, even if ABA therapy were considered partly educational, it is provided in a therapeutic context by a medically trained professional, and so it is medical care.

Likewise, in a 2007 Report to Congress, DoD distinguishes interventions that are "medically necessary" from interventions that are "educationally necessary." DoD based that distinction on the level of intensity of the intervention rather than on the nature of the intervention. DoD stated as follows:

> For children with autism, the TRICARE basic program covers services such as physician office visits, immunizations, and interventions such as speech therapy, physical therapy, and occupational therapy. Autistic children age three years and older often receive speech, physical, and occupational therapy provided by public or Department of Defense Educational Activity (DoDEA) schools to the extent that

[9] Specifically, ABA therapy is "behavioral psychology," within the field of medicine, not the field of "education." The American Psychological Association states that "behavior analysis" and "behavior therapy" are "sub-areas of Behavioral Psychology." American Psychological Association, "Description of 'Behavioral Psychology,'" available at http://www.apa.org /ed/graduate/specialize/behav.aspx.

> they are considered **educationally necessary**. Additional speech, physical, or occupational therapy may be provided **by the TRICARE basic program** when additional therapy is considered to be **medically necessary**.

(Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p. 9) (emphasis added). In other words, according to DoD, occupational therapy, physical therapy, and speech therapy are *educationally* necessary when provided by a school at the lower level of intensity typically provided by and in schools. But these therapies are *medically* necessary when provided by a specialized therapist at the higher level of intensity typically provided by medical therapists. Moreover, according to DoD, in the former circumstance, DoD-operated schools pay for the therapies, whereas in this latter circumstance, the TRICARE Basic health benefits program pays for the therapy. Likewise, the nation's public schools pay for occupational therapy, physical therapy, and speech therapy when the schools provide those therapies at an educationally necessary, lower level of intensity, whereas private insurers or government health benefits programs (like Medicaid) pay for these therapies when health care professionals provide these therapies at a medically necessary, higher level of intensity. ABA therapy, when delivered at a therapeutically effective level of intensity, is likewise provided by an ABA therapist or behavioral psychologist and not by a special education professional and is reimbursed by private insurance or a government health benefits program. Therefore, ABA therapy is "medically necessary" and shall be provided under the TRICARE Basic program.

As stated by Dr. Gina Green, one of the leading experts on autism treatment and research:

> ABA intervention for ASD parallels the intensive speech, occupational, and physical therapies that are provided to children and youths with other neurological disorders to build or rebuild communication, cognitive, self-care, academic, and other skills. Those therapies are often delivered in schools, yet they are not narrowly construed as "special education." On the contrary, they are deemed medically necessary, and are covered by most health insurance plans. ABA intervention should be granted the same status.

(Ex 27, *Letter to Assistant Secretary of Defense for Health Affairs dated September 2, 2008*, p.5).

3. The Progression and Codification of the "Special Education Exclusion" Does Not Change the Meaning of the Exclusion

In the 1983 and 1984 appropriations bills for the Department of Defense, Congress enlarged and changed the list of services that were excluded from the Basic program. Pub. L. 97-377, sec. 741 (1982) (Ex 28); Pub. L. 98-212, sec. 738 (1983) (Ex 29). The list no longer exclusively consisted of services that are "not medically necessary." Furthermore, the listed services now included various exceptions to the exclusions themselves – i.e., situations in which otherwise not medically necessary services might become medically necessary. *Id.* For example, counseling services were still excluded, "unless the patient has been referred to such counselor by a medical doctor for treatment." *Id.* Surgery for physical appearance was still excluded, except that "reconstructive surgery to correct serious deformities caused by congenital anomalies, accidental injuries and neoplastic surgery are not excluded." *Id.* The listed services also included mere limitations on otherwise medically necessary care, such as limiting "reimbursement of any physician or other authorized individual provider of medical care in excess of the eightieth percentile of the customary charges[.]" *Id.* The language of the "special education exclusion," however, remained exactly the same as in the prior appropriations bills. *Id.*

Because the list of excluded services became a list of not only exclusions, but also exceptions to the exclusions and mere limitations on medically necessary care, the catch-all phrase at the end of the list was changed to a stand-alone phrase that simply excluded "any service or supply which is not medically or psychologically necessary." *Id.* Of course, because the list now included services that *were* medically necessary in certain instances, the list could no longer end with the original catch-all phrase that excluded "any **other** service or supply which is **not medically necessary**." *Id.*

In the 1985 appropriations bill for the Department of Defense, Congress "codified" – in section 1079(a) of the Military Health Benefits Statute – the list of excluded services that

Congress had been including in the appropriations bills over the years. Pub. L. 98-525, Title XIV, sec. 1401 (Ex 25). This list of excluded services, which remains at 10 U.S.C. 1079(a), is very similar to the list contained in the 1983 and 1984 appropriations bills. It is a list of not only exclusions to coverage, but also exceptions to the exclusions, where medically necessary care is allowed, as well as mere limitations on medically necessary care. Pub. L. 98-525, Title XIV, sec. 1401 (Ex 25). For the same reasons that the catch-all "or any other" phrase was changed to a stand-alone phrase in the 1983 and 1984 appropriations bills, Congress included the stand-alone phrase in the 1985 codification. *Id.* It would have been contradictory to include the catch-all phrase that excluded "any **other** service or supply which is **not medically necessary**," because now the list, of course, includes services that *are* medically necessary.

None of this changes the fact that Congress enacted the "special education exclusion" because special education was deemed "not medically necessary," just like all of the other services included in the original list of exclusions. Pub. L. 94-212, sec. 751 (1976) (Ex 24); Pub. L. 94-419, sec. 743 (1976) (Ex 26). With the catch-all exclusion of "any other" not medically necessary services, Congress made clear that the list of excluded services all shared the characteristic of not being medically necessary. The reverse *ejusdem generis* principle compels this conclusion. The House Report distinguishing the field of "education" from "medicine" lends further support. H. Rep. 94-517 (1975). The "special education exclusion" itself never changed substantively, but the various exclusions that surrounded it changed, so that they ceased to be strictly exclusions of not medically necessary services. It makes sense that, as soon as the exclusions changed, so did the catch-all exclusion.

4. The Codification of Recurring Provisions Did Not Enact New, Substantive Law or Supersede the Original Congressional Intent, Which Is that "Special Education" Includes Within Its Meaning Only Services that Are "Not Medically Necessary"

Congress's express and limited purpose in amending section 1079(a) to add the list of

excluded services was to perform the "Codification of Certain Recurring and Permanent Provisions of Law." Pub. L. 98-525, Title XIV, sec. 1401 (Ex 25). Specifically, as stated in the House Conference Report accompanying the bill, the purpose was "to codify certain recurring provisions of the annual Defense Authorization and Appropriation Acts." H.R. Conf. Rep. 98-1080. As stated by the U.S. Supreme Court, "[c]odification contemplates, implies and produces continuity of existing law in clarified form rather than its interruption." *United States v. Grainger*, 346 U.S. 235, 248 (1953). See also *In re Hosek*, 136 B.R. 672, 673-674 (W.D. Tex. 1991) ("The primary purpose of codification is to rearrange separate statutes into a convenient, integrated system of statutory law regarding a particular subject."); *Powell v. Utz*, 87 F. Supp. 811, 816 (D. Wash. 1949) ("The primary legislative purpose in codification is to simplify and clarify the wording of prior legislative enactments and to eliminate duplications, obsolete material and the like.").

Thus, by its stated purpose, the amendment to the Military Health Benefits Statute that included the "special education exclusion" was simply an endeavor by Congress to continue, organize, and summarize the various exclusions, exceptions, and limitations regarding Basic program coverage that Congress had included in the appropriations bills over the years. The purpose was not to enact new, substantive law or to change the meaning of the recurring provisions from the prior appropriations bills. See *Grainger*, *supra* at 248; *Powell v. Utz*, 87 F. Supp. 811, 816 (D. Wash. 1949) ("It is unusual, to say the least, for the legislature in enacting a code to basically change prior laws without giving some clear indication as to what changes are intended."); *In re Hosek*, 136 B.R. 672, 673-674 (W.D. Tex. 1991) ("The codification process entrusted to the Legislative Council cannot, and does not, confer substantive meaning to a statute. "). Accordingly, by omitting the word "other" from the catch-all phrase "or any other" not medically necessary services, Congress did not assign a new, substantive meaning to the

nature of the "special education exclusion." The codification simply endeavored to collect the various provisions from the appropriations bills over the years in a manner that made logical sense, without assigning an incorrect meaning to any provision.

The substantive meaning of the "special education exclusion" is to be determined with reference to its original, substantive enactment, in the first appropriation bills. "It has long been settled that Congress may enact substantive legislation by an amendment to an appropriation bill. *United States v. Burgess*, 1987 U.S. Dist. LEXIS 11227, 18 (N.D. Ill.) (Ex 30). "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883); *United States v. Dickerson*, 310 U.S. 554, 555 (1940). Here, Congress enacted the "special education exclusion" in the first appropriations bills, and continued re-enacting the same exclusion in subsequent bills. At the time of the exclusion's original enactment, the House Report shows that Congress considered that "education" is a field distinct from "medicine." It is clear that Congress intended to enact substantive law in its first passage of the "special education exclusion," and Congress's intent in the context of those first enactments is what controls the instant interpretation of the "special education exclusion." See *Powell v. Utz*, 87 F. Supp. 811, 815 (D. Wash. 1949) ("In the construction of a statute which . . . contains a . . . codification of an earlier law, resort may be had to the repealed or superseded statute to aid in the discovery of the legislative intent."). As explained above, Congress's intent was to exclude "special education" because Congress deemed it to not be medically necessary.[10]

[10] See also *United States v. Burgess*, 1987 U.S. Dist. LEXIS 11227, 19 (N.D. Ill.) (Ex 30) ("The fact that Congress enacted legislation in an appropriations bill "does not make Congress' intention in enacting that legislation any less clear. Congress has not enacted permanent legislation . . . but has chosen instead to grant such authority in appropriation measures which expire at the end of each fiscal year. However, no authority has been cited by defendants or found by the court which says that Congress' intent is unclear or should not be given effect merely because it is embodied in temporary rather than permanent legislation.").

C. ABA Therapy Is Not "Special Education" Within the Meaning of DoD's Regulations Defining "Special Education," which Incorporate IDEA and Its Regulations Implemented by the U.S. Department of Education

In 1975, Congress enacted the Individuals with Disabilities Education Act ("IDEA"), which required the public schools to provide an appropriate level of "special education" and "related services" for all of the nation's children, including children from military families. See 20 U.S.C. 1401(8), 1412(a)(1). The "free appropriate public education" required by IDEA is often referred to as "FAPE."

One year later, in 1976, the same Congress excluded "special education" that is not provided in a military treatment facility from coverage as a Basic military health benefit. The timing of the "special education" exclusion is revealing. Having just passed IDEA into law, Congress intended that schools, subject to the prod of IDEA, would provide "special education" to children, including children from military families. Because IDEA now required that "special education" shall be paid for by the nation's federal, state, and local education budgets, Congress enacted that the military's Basic health care program budget should not also pay for special education. Importantly, as explained below, ABA therapy is **not** "special education" that is provided in schools pursuant to IDEA.

For purposes of administering the Military Health Benefits Statute, DoD expressly adopts IDEA's definition of "special education." In its regulations regarding ECHO program coverage, DoD defines "special education as provided by the Individuals with Disabilities Education Act [IDEA] and defined at 34 C.F.R. 300.26 [sic - special education is defined at 34 C.F.R. 300.39, not 34 C.F.R. 300.26] and that is specifically designed to accommodate the disabling effects of the qualifying condition." 32 C.F.R. 199.5(c)(4). The IDEA and its implementing regulations promulgated by the U.S. Department of Education define "special education" as follows:

> The term "special education" means specially designed **instruction, at no cost to [the] parents, to meet the unique needs** of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. 1401(29); 34 C.F.R. 300.39(a)(1) (emphasis added). As explained below, ABA therapy does not fit within the definition of "special education" found in IDEA and its implementing regulations – the definition adopted by DoD.

Because the instant motion asks this Court to find that ABA therapy is not "special education" as that phrase is used in the Military Health Benefits Statute, for purposes of this inquiry the Court must look to the definition of "special education" in its context, with reference to IDEA. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("The meaning of one statute may be affected by other Acts[.]"). Citing its earlier decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989), the *Williamson* Court further states that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Williamson, supra* at 133. See also *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[W]e do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (citation omitted); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 n. 6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]").

In both the mind of Congress at the time it passed the Military Health Benefits Statute "special education" exclusion and in the mind of DoD when it promulgated the regulatory definition of the exclusion, both the mandate that IDEA imposed on the nation's public schools to provide access to a meaningful special education to all of the nation's special needs children and IDEA's definition of "special education" loomed decisively large and cast a giant shadow.

The meaning of IDEA and the relationship of IDEA and its implementing regulations to the Military Health Benefits Statute's "special education" exclusion are central to understanding what Congress intended when it adopted that exclusion and what DoD itself understood that Congress intended when it adopted its regulatory definition of that exclusion.

1. ABA Therapy Is Medically and Psychologically Necessary Health Care and Mental Health Care and Is Not "Special Education," Because It Is Behavioral Intervention, Not Educational "Instruction"

As noted above, IDEA and its implementing regulations define "special education" as "instruction," among other things, 20 U.S.C. 1401(29); 34 C.F.R. 300.39(a)(1), and DoD has expressly adopted IDEA's definition of "special education." The word "instruction" is not defined in IDEA or its regulations. To ascertain the plain meaning of the word "instruction," as well as other relevant words, the Court may, therefore, look to the dictionary definition or common usage of the word. *Smith v. United States*, 508 U.S. 223, 228 (1993) ("[W]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, 562 (D.C. Cir. 1982) ("[T]he Authority relied upon the plain meaning of the word 'direct' in construing this statutory phrase," citing Webster's Dictionary. "It goes almost without saying that this is an established and satisfactory technique of statutory construction.").[11]

The dictionary defines "instruction" as "[i]mparted knowledge" or "an imparted or acquired item of knowledge; a lesson." The American Heritage Dictionary of the English Language (4th ed. 2009). "To instruct" essentially means "to school." Random House Dictionary, Random House, Inc. (2010). The word "instruction," thus, typically refers to the transmission of academic information from "teacher" to "student." ABA therapy, in contrast,

[11] See also, e.g., *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 497 (U.S. 1981) (With reference to the dictionary definition of the word, "[t]he plain meaning of the word 'feasible' supports respondents' interpretation of the statute."); *Muscarello v. United States*, 524 U.S. 125, 128 (1998) (interpreting a statutory term in light of its dictionary definition).

involves the intervention by a "therapist" in the behavioral condition of a "patient," through intense analysis and psychotherapy, not with the goal of imparting academic information to the patient, but with the goal of changing the patient's behavior and expanding the patient's capacity to function in the world. ABA therapy "utilizes constant and consistent data to analyze what techniques are working and how, and draws upon a system of planned reinforcements to bring an autistic child into a world where the child can communicate and function independently." *Michael J. v. Derry Twp. Sch. Dist.*, 2006 U.S. Dist. LEXIS 5093 (M.D. Pa. Jan. 19, 2006) (Ex 31). ABA therapy is not "instruction." It is psychotherapy, performed by highly trained behavioral psychologists and applied behavioral analysts.

The U.S. District Court in *McHenry* discussed the distinction:

> While aimed at improving social and academic functioning, [ABA therapy] does this by **specifically addressing behavioral deficits possessed by autistic children that interfere with every area of their life, <u>not</u> by** educating kids on social norms or **teaching study skills** or other **tools specific to academic success.**

Supra at 1237 (emphasis added). Thus, ABA therapy is a behavioral intervention that substantially improves an autistic child's ability to function in various aspects of life, and is distinct from academic instruction or even the teaching of tools for academic success.

Both experts and courts have specifically distinguished education or "instruction" from the behavioral "therapy" that is Applied Behavioral Analysis. As stated by one of the leading experts on autism treatments and research – a Board-Certified Behavior Analyst who holds a Master's Degree in Educational Psychology and a Ph.D in Psychology-Analysis of Behavior – in a letter to DoD's Assistant Secretary for Health Affairs: "**<u>ABA is not special education</u>**." (Ex 27, *Letter to Assistant Secretary of Defense for Health Affairs dated September 2, 2008*, p. 4) (emphasis in original). "ASDs [autism spectrum disorders] affect multiple areas of functioning, not just the skill domains that are typically addressed by the education system." Likewise, in a letter to Secretary of Defense Robert Gates, a collaboration of "the longest standing autism

organizations" explained that "Applied Behavior Analysis and related structure behavior programs are **not special education** and this categorization [by DoD] requires correction." (Ex 14, *Autism Collaboration Letter dated May 19, 2008*) (emphasis added).

Behavioral therapy is not converted into educational instruction simply because the therapy may have a positive impact on a child's ability to receive academic instruction in school. For example, as the Federal Court of Claims recognized, in finding reasonable a hearing officer's decision to deny coverage for a military beneficiary's education costs under the Basic program:

> Despite plaintiff's insistence that such educational services were therapeutic and a part of the treatment program, the hearing officer determined that teachers did not fit within the provisions of the regulations as authorized CHAMPUS providers, 32 C.F.R. § 199.12, and furthermore, found these services to fall within those services excluded by the regulations.

Woods Psychiatric Institute v. United States, 20 Cl. Ct. 324, 341 (Cl. Ct. 1990). As stated by the hearing officer, and upheld by the court:

> **The fact that education was provided to those students who were too disturbed to attend the public schools . . . does not convert the educational component of that service into a therapeutic service. The purpose of having the teachers in the on campus school was to provide the patients with an education – English, History, Mathematics, Geography, etc.** – and education, whether routine or special, is not eligible for CHAMPUS cost-sharing[.]

Id. (emphasis added). Thus, the hearing officer and court recognized that "education," even if specialized, is to be construed according to its obvious purpose – which is to teach traditional academic subjects, such as math and English, to students, even to "disturbed" students. Despite the fact that the "education" services were provided to disabled children in an alternative setting, the services remained "educational," and were not "therapeutic." Meanwhile these "educational" services fit squarely within the dictionary definition of "instruction," as their purpose "was to provide the patients with an education – English, History, Mathematics, Geography, etc." *Id.* "Educational" services and "therapeutic" services are distinct from one another.

The U.S. District Court in *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d

1226, 1241 (D. Or. 2010), thoroughly discussed this distinction between "therapy" and "education" in the context of ABA therapy. The court's analysis is highly instructive:

> While ABA therapy may have beneficial effects on an autistic child's social and academic skills, its defining characteristic is application of techniques to modify behavior in every area of an autistic child's life. In this regard, a sports analogy is instructive. While participation in sports can benefit a student's academic and social skills, no one would classify sports as academic or social skills training. Similarly, the incidental benefits in these areas resulting from ABA therapy, while real, **do not dictate that it be classified . . . as academic . . . training.** Rather, it is more properly classified as behavioral modification.

Id. (emphasis added). Thus, the court recognized that simply because behavioral therapy has wide-ranging beneficial effects on a child's life, which may include academic performance in school, the ABA "therapeutic" service is not somehow converted to an "education" service. The court continued as follows:

> PacificSource's contrary interpretation would sweep many other covered benefits into **this exception to which it clearly does not apply. Nearly all types of psychological treatment (counseling, psychotherapy, etc.) could be classified as academic . . . training.** These types of treatments, like ABA therapy, undoubtedly have benefits on a person's ability to succeed in education and help to teach proper skills . . . . However, they would presumably not fall within those exclusions. . . . To find for PacificSource on this issue would be to improperly stress the benefits of ABA therapy in only two out of many areas of functioning.

Id. (emphasis added). Likewise, to find that ABA therapy is subject to the "special education exclusion" in the Military Health Benefits Statute would be to "sweep" an otherwise covered medical benefit into an exception that does not apply. The *McHenry* court hit the nail on the head and got it exactly right: ABA therapy is psychotherapy that has positive effects on a child's "ability to succeed in education," but therapeutic services do not, therefore, become "academic" or "educational" for purposes of excluding them from health care coverage. *Id.* "According to the weight of the evidence, ABA therapy is not primarily academic . . . training, but is behavioral training. Accordingly, it is not subject to the exclusion[.]" *Id.*

2. ABA Therapy Is Medically and Psychologically Necessary Health Care and Mental Health Care and Is Not "Special Education," Because It Substantively Reduces or Cures the Symptoms of Autism, Rather than "Accommodates" Its Disabling Effects

In addition to adopting by reference the definition of "special education" under IDEA, DoD's regulations further define "special education" as "instruction" that "is specifically designed to **accommodate** the disabling effects of the qualifying condition." 32 C.F.R. 199.5(c)(4) (emphasis added). Because DoD does not define the word "accommodate" in its regulations, the Court may, therefore, look to the dictionary definition or common usage of the word to determine its plain meaning. See case citations *supra*. The common meaning of "accommodate" is "[t]o make suitable; adapt" or "[t]o allow for." American Heritage Dictionary of the English Language (4th ed. 2009). ABA therapy is not designed to "accommodate" the effects of autism. The therapy certainly does not "allow" one's autism, nor does it create an environment "suitable" for one's autism; it does just the opposite, as ABA therapy is designed to reduce or eliminate the harmful effects of autism. See, e.g., *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 905, 917 (S.D. Ohio 2008), *aff'd* , 339 Fed. Appx. 542 (2009) ("ABA therapy . . . is a medically necessary service which provides the **maximum reduction** of a mental or physical disability.") (emphasis added).

Indeed, the very term "therapy" is derived from the Greek word "therapeia," meaning "curing" or "healing." Online Etymology Dictionary, Douglas Harper (2010), available at http://www.etymonline.com. ABA therapy involves the treatment or "healing" of an existing medical condition – the remediation of the disability itself as well as its symptoms and deficits. As stated by a U.S. District Court, "the weight of the evidence demonstrates that ABA therapy is firmly supported by decades of research and application and is a well-established **treatment** modality of autism . . . . From a review of the numerous articles and other material in the record, this court finds no basis for [the] opinion that 'ABA was not a well-proven or evidence-based

standard of **medical care**'. . . . Indeed, just the opposite is the case." *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d 1226, 1237 (D. Or. 2010) (emphasis added). Behavior "therapy" contemplates a patient with a mental disorder that needs remediation, and a therapist who attempts to remediate or cure the disorder. "Specially designed instruction" or "special education" does not contemplate a remedy or cure of the mental or physical disorder itself.

The goal of "special education," or "accommodation," is modest: it is to adapt pedagogy to impart academic information to a student. "Accommodation," in the context of "special education," does not remediate the child's existing illness or medical condition. "Accommodation" is simply modifying the method of academic instruction to suit a student's needs. For example, a typical guide for special education teaching lists the following "common accommodations" in its section on "accommodation strategies": accessible classroom/location/ furniture, advance notice of assignments, alternative ways of completing assignments (e.g., oral presentation versus written paper), assistive computer technology, assistive listening devices, captions for video material, course or program modifications, document conversion (alternative print formats: braille, large print, tape, electronic, raised lettering), test modifications, time extensions, and taped lectures. Collaborative Teaching: Special Education for Inclusive Classrooms, available at http://www.parrotpublishing.com/Inclusion_Chapter_6.htm.

Likewise, for purposes of providing "accommodation" for students with disabilities in the DoD Education Activity Schools that it administers, DoD itself has issued a definition of "accommodation," which includes the following:

> Accommodations may include changes in presentation and/or response format and/or procedures, instructional strategies, time/scheduling, environment, and equipment. Includes, the delivery of such supplemental or auxiliary services or aids designed to accommodate the known limitation of a person with a disability under this Instruction . . . . Examples of 504 Accommodations include, but are not limited to: modified homework assignments, provision of readers or audio tapes of text books, changes in the time or method of testing, or changes in seat assignments.

(Ex 32, *DoD Education Activity, Administrative Instruction, 2500.14, April 29, 2009*, Glossary).

Both the special education guide above and the DoD's own discussion of "accommodation" reveal its obvious nature. "Accommodation" refers to the more trivial, technical, and administrative adjustments to academic instruction that may increase accessibility to education for a disabled child. Fundamentally, "accommodation," in the context of "special education," is premised on accepting the capacity of individual as fixed within the boundaries imposed by the disability, with the simple goal of imparting academic information to the student, using teaching methods and devices modified to better enable the imparting of academic information to a disabled student.

Therapies like ABA, in contrast, are fundamentally designed to enhance or expand the capacities of the child beyond the boundaries fixed by the disease. They are focused on addressing a condition that is modifiable. Their goal is to move the boundaries of capacity, not to accept or accommodate those boundaries. ABA therapy is "the process of applying interventions that are based on the principles of learning derived from experimental psychology research to **systematically change behavior** and to demonstrate that the interventions are responsible for the observable improvement in behavior." Dr. Plauché Johnson et al., "Pediatrics: Management of Children With Autism Spectrum Disorders," available at www.pediatrics.org/cgi/doi/10.1542/peds.2007-2362 (emphasis added). With ABA therapy, "[a]s new skills are acquired, they are 'generalized' into other settings with the intent that the child learns to **employ that skill in a new situation** and without the encouragements or 'prompts' initially relied upon." *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d 1226, 1231 (D. Or. 2010) (emphasis added). "Researchers have found ABA to be effective in reducing problem behaviors. . . and in **improving a child's ability to function** in multiple areas including 'intellectual, social, emotional, and adaptive functioning.'" *Id.* at 1237 (emphasis added). Thus,

because ABA therapy substantively reduces or cures the symptoms of autism, rather than "accommodate" its disabling effects, ABA therapy is not "special education."

3. ABA Therapy Is Medically and Psychologically Necessary Health Care and Is Not "Special Education," Because It Is Almost Never Provided "at No Cost to the Parents"

IDEA and its implementing regulations not only define "special education" as "instruction," but as instruction that is "provided at no cost to [the] parents." 20 U.S.C. 1401(29); 34 C.F.R. 300.39(a)(1). By using the words "at no cost to the parents," and in the context of an act (IDEA) whose stated purpose is to ensure a free and appropriate public education, Congress unambiguously limited "special education" to instructional services that are customarily provided "at no cost" in the nation's public schools. ABA therapy, however, is almost never part of any special education curriculum provided at the nation's public schools, and so it fundamentally cannot meet the definition of "special education." As stated in DoD's own report, quoting "Family Contributors, In Their Own Words":

- "Schools are not designed or equipped to provide ABA services"
- "ABA is generally not available in the public schools"

(Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p 31). Plaintiffs are not aware of a single school in the country that provides a therapeutically effective level of ABA therapy for children with autism. Instead, military families routinely spend thousands of dollars per year to provide their autistic children with appropriate, medically necessary ABA therapy.

By its very definition, with the generally recommended intensity of 25 to 40 service hours per week and most of the therapy on a one-to-one basis, ABA therapy cannot be effectively provided if confined to an educational or even "special education" environment. As explained aptly by one of the leading experts on autism treatment – a Board Certified Behavior

Analyst with a Master's Degree in Educational Psychology and a Ph.D in Psychology-Analysis of Behavior – in a letter to DoD's Assistant Secretary for Health Affairs:

> Abundant research shows that in order to generalize learned skills, people with ASD need **carefully planned, consistently delivered behavior analytic intervention throughout each day, 7 days a week, year around, in multiple environments.** Behavior analysts have developed specific techniques for promoting skill generalization. Importantly, those techniques include training family members to prompt and reinforce functional skills and to manage problem behaviors in a variety of everyday settings. **The education system unfortunately lacks the resources to provide that kind of intervention. Therefore, if the responsibility for treating ASD is placed entirely on the schools, most people with ASD will not receive effective treatment so will require substantial and expensive health care and other services throughout their lives.**

(Ex 27, *Letter to Assistant Secretary of Defense for Health Affairs dated September 2, 2008*, p. 4) (emphasis added). Experts in the field have similarly explained:

> While it is critical for schools to provide appropriate supports for special needs children in the classroom, **ABA and other behavior intervention methods are not "special education" in and of themselves**. We stress the importance of using such techniques in the classroom to help children in the academic environment, but **treating autism goes far beyond the classroom**.

(Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*).

DoD's own written statements have acknowledged that ABA therapy is not provided in the public schools. In its April 15, 2010, denial of a request from a member of the military to have the $36,000 cap on ECHO coverage for ABA therapy waived, DoD through TMA stated:

> ABA services provided under the ECHO Program are an educational benefit **intended to supplement the educational services available in your local schools** and communities, such as the North Carolina TEACCH Program. ABA is not authorized under the TRICARE Basic Program.

(Ex 33, *Denial Letter of Waiver Request dated April 15, 2010*) (emphasis added). DoD's response suggests that North Carolina public schools do not provide ABA therapy, and that ABA therapy clearly is a service beyond the "educational services" provided in public schools. Thus, by DoD's own admission, ABA therapy is not an educational service customarily "available in . . . local schools." See also *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F.

Supp. 2d 905, 917 (S.D. Ohio 2008), *aff'd* , 339 Fed. Appx. 542 (2009) (holding that ABA therapy is a medically necessary service for purposes of reimbursement under the federal Medicaid statute, and that "the services Plaintiff children need are not provided at the same intensive level elsewhere[.]"). In other words, the nation's schools do not regard ABA therapy to be a constituent part of "special education" required under IDEA.

If the nation's public schools regarded ABA therapy as "special education" under IDEA, the schools would be routinely providing ABA therapy to students. Indeed, the reality that the nation's schools do not provide ABA therapy is revealed by the presence of laws or pending legislation in at least 37 states to require that private insurers provide ABA therapy as a mandatory benefit. (Ex 17, *Map of State Autism Insurance Reform Bills*). If the nation's schools already provided ABA therapy on a widespread basis, states would not be approving laws and considering legislation to require insurance companies to provide for a fee what is already widely provided by schools free of charge. If ABA therapy was part of the special education curriculum in the schools, people would not be clamoring for the legislatures to force insurers to cover it.

4. ABA Therapy Is Not "Special Education," Because It Is Not Part of the Free and Appropriate Special Education Obligation of Schools under IDEA, as Interpreted by the Supreme Court

Pursuant to the Supreme Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), and subsequent decisions of the Court and lower courts interpreting both *Rowley* and the effect of the amendments to IDEA, the "free and appropriate" special education required by IDEA is a program of services "reasonably calculated to confer meaningful educational benefit." *Rowley*, *supra*; see also *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999). The nation's public schools have been subject to the requirements of the IDEA statute for nearly 35 years. If ABA therapy were required by the federal courts to be part of a program of services "reasonably calculated to confer meaningful educational benefit" on autistic children, by this time ABA

therapy would be commonly provided by public schools to autistic children as part of their "special education" programs.

Federal courts have interpreted *Rowley* and the IDEA amendments to mean that IDEA does not require schools to provide students with the best or even optimal education, nor to ensure that students receive services to enable them to maximize their potential. *See Logue by & Through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338, 1351 (D. Kan. 1997) ("[S]chools do not have to provide services to 'maximize each child's potential.'"), citing *Rowley*, *supra* at 198. Courts sometimes refer to this as the "Cadillac" versus "Chevrolet" argument, with the student entitled to a serviceable Chevrolet, not the Cadillac. See, e.g., Doe v. Bd. of Educ., 9 F.3d 455, 459-460 (6th Cir. 1993) (IDEA requires the equivalent of a "serviceable Chevrolet" for all disabled children, not a Cadillac for the individual.). Whatever a post-*Rowley* "meaningful educational benefit" special education is, it almost never includes ABA therapy. No federal court has ever held that a K-12 public school must provide ABA therapy as part of the "serviceable Chevrolet services" required by IDEA of special education in the United States. Thus, if "special education" means the "special education" that K-12 schools are required to provide pursuant to their FAPE obligation under the IDEA statute, the courts have held that ABA therapy is not "special education" under IDEA.

For purposes of administering the Military Health Benefits Statute, DoD has adopted the definition of "special education" under IDEA and its implementing regulations. For all of the foregoing reasons, ABA therapy does not fit within the literal or functional definition of "special education" under IDEA.

5. ABA Therapy Is a "Related Service" under IDEA, and Is, Therefore, Not "Special Education"

Congress enacted IDEA in 1975, and required the nation's public schools in every participating state to provide and to pay for an "appropriate" quantum of "special education" as

well as "related services" for all of the nation's children, including children of members of the military. See 20 U.S.C. 1401(8), 1412(a)(1). One year later, in 1976, the same Congress excluded from coverage, as a Basic military health benefit available outside of a military treatment facility, the "special education" that public schools, now subject to the prod of IDEA, provide. Pub. L. 94-212, sec. 751 (1976) (Ex 24). Congress pointedly chose not to exclude "related services" required under IDEA from coverage as a Basic military health benefit. However, the nation's courts have repeatedly held that because IDEA does not guarantee disabled children the right to maximize their potential, but only requires that schools provide a floor of meaningful educational benefit, ABA therapy is not part of the "free and appropriate education" and "special education and related services" required by IDEA.

Importantly, in the future, if a court should determine that ABA therapy is part of the "free and appropriate public education" required by IDEA, it would be because ABA therapy is a "related service" and not because ABA therapy is "special education." In other words, ABA therapy, if it were provided by schools at a therapeutically effective level of intensity, which it is not, falls within the definition of a "related service." This is because it may "*assist* a child with a disability to benefit from special education." 20 U.S.C. 1401(26)(a) (emphasis added).

The fact that ABA therapy is, by definition, a "related service" under IDEA, means that it cannot also be "special education" under IDEA. The two categories are distinct – "special education" is academic instruction, whereas "related services" *assist* a disabled child to receive academic instruction. "Related services" are antecedent to and make "special education" possible. While ABA therapy may be necessary to prepare an autistic child to benefit from an education, it is not because ABA therapy *is* special education. In turn, because ABA therapy cannot be "special education" under IDEA means that it cannot be "special education" under the Military Health Benefits Statute, which incorporates by reference the definition of "special

education" under IDEA.

The definition of "related services" under IDEA reads as follows:

> The term "related services" means transportation, and such **developmental, corrective, and other supportive services** (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) **as may be required to assist a child with a disability to benefit from special education**, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. 1401(26)(a) (emphasis added); see also 34 C.F.R. 300.34(a). ABA therapy clearly falls within the general, overarching definition of "related services," because ABA is "developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. 1401(26)(a). See also, e.g.,*Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994) (acknowledging that one-to-one behavioral intervention services for autistic child were "related services" under IDEA and not "special education"). Behavioral interventions, like ABA, are quintessential "related services."

Indeed, ABA therapy, in its different aspects, falls within the more specific definitions of several enumerated examples of "related services" listed and described in IDEA and its implementing regulations, including:

- **"Psychological services,"** which include "assisting in developing positive behavioral intervention strategies." 34 C.F.R. 300.34(c)(10)(vi). ABA therapy clearly includes the same. Indeed, this lies at the heart of ABA therapy. Psychological services also include "administering . . . assessment procedures," "interpreting assessment results," and "obtaining, integrating, and interpreting information about child behavior and conditions related to learning." 34 C.F.R. 300.34(c)(10)(i), (ii), and (iii). ABA therapy clearly includes the same.

- **"Social work services,"** which include "assisting in developing positive behavioral intervention strategies." 34 C.F.R. 300.34 (c)(14)(v). ABA therapy clearly includes the same, as this lies at the heart of ABA therapy. Social work services also include "individual counseling with the child," and "working in

partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school." 34 C.F.R. 300.34(c)(14)(ii) and (iii). ABA therapy clearly includes the same.

- "**Speech-language pathology services**" include "diagnosis and appraisal of specific speech or language impairments," "provision of speech and language services for the habilitation or prevention of communicative impairments," and "counseling and guidance of parents, children, and teachers regarding speech and language impairments." 34 C.F.R. 300.34(c)(15)(ii), (iii) and (iv). ABA therapy clearly includes the same.

- "**Counseling services**" means "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel." 34 C.F.R. 300.34(c)(10). ABA therapy clearly includes counseling by qualified and certified Applied Behavior Analysts.

Thus, because ABA therapy is a developmental, corrective, and supplemental therapeutic service that may assist a child to benefit from special education, it is a "related service" and is not "special education" under IDEA.

Although ABA therapy is a "related service" under IDEA, the FAPE mandate of IDEA has been interpreted by the Supreme Court and subsequent decisions to only require that schools provide a "basic floor of opportunity" for children to obtain a "meaningful educational benefit." *Rowley*, *supra* at 200-201. Schools are *not* required to provide services to "maximize each child's potential." *Rowley*, *supra* at 198. The courts have repeatedly held that because IDEA does not guarantee disabled children the right to maximize their potential, ABA therapy, at a therapeutically effective level of intensity, is not a part of the "free and appropriate education" required by IDEA. See, e.g., *Michael J. v. Derry Twp. Sch. Dist.*, 2006 U.S. Dist. LEXIS 5093, 61-62 (M.D. Pa. Jan. 19, 2006) (Ex 31) (Rejecting plaintiff's argument, supported by experts, that child should exclusively receive intensive "ABA-based services," where school district could not offer qualified personnel, because "the District complied with the substantive provisions of the IDEA" and "the goals and objectives, although perhaps not perfect, were appropriate and designed to provide Patrick meaningful educational benefit."); *Dong ex rel. Dong v. Board of Educ.*, 197 F.3d 793, 802-804 (6th Cir. 1999) ("Plaintiffs' belief that the [more

intense, one-on-one behavioral therapy] program would be best able to develop Lisa's potential does not mean that it was the only FAPE that the District could offer under the IDEA. . . . As a result, the Dongs may not receive reimbursement for the cost of providing Lisa with what they believe to be a better program.").[12]

Thus, in the future, if the nation's courts were ever to require public schools to provide ABA therapy as part of their obligation to provide a "free and appropriate public education" under IDEA, it would be because ABA therapy is a "related service" and not because ABA therapy is "special education."

Meanwhile, several categories of "related services" are also "medically necessary" services that *are* covered by the TRICARE Basic program, just as ABA therapy services should be. Such "related services" – including psychological services and speech therapy – are considered "Chevrolet" therapies and are provided as part of a school's "related services" FAPE obligation. But they are still covered under the Basic military health benefits program. (See, e.g., Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p. 9) ("For children with autism, the TRICARE basic program covers services such as physician office visits, immunizations, and interventions such as speech therapy, physical therapy, and occupational therapy."). If so, then surely Cadillac-level "related services" like ABA therapy – which IDEA does not require schools to provide and which schools rarely, if ever, voluntarily

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[12] See also *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 U.S. Dist. LEXIS 3690, 34-35 (S.D. Ind. Feb. 4, 2005) (Ex 34) ("Even the school district's experts credited ABA with some of Bobby's progress. But this evidence does not establish that ABA was the only way for Bobby to be educated, or that it was unreasonable at the time to suppose that Bobby could receive meaningful educational benefits from a program that did not include ABA."); *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 94860, 36-39, 45-46 (S.D. Ohio Sept. 28, 2009) (Ex 35) (While plaintiffs made arguments that 30 to 40 hours of ABA services were required, "none compels the conclusion that 40 hours of ABA is mandated by law. . . . The School District has, therefore, satisfied its obligation to provide a FAPE to Christian."); *J.P. v. W. Clark Cmty. Schs.*, 230 F. Supp. 2d 910, 934, 939 (S.D. Ind. 2002) (Rejecting argument that ABA approach was required to provide FAPE to child, because, according to court, "[t]he law does not require [the schools] to provide J.P. with the better or best possible education. [The schools'] duty is only to provide an education that is reasonably calculated to benefit J.P.").

provide – are covered under the Basic military health benefits plan.

Indeed, the plain text of the "special education" exclusion itself, as first passed into law, shows that Congress did not intend to exclude such "related services" treatments from coverage under the Basic military health benefits program. In the 1976 defense appropriations bill, just one year after enacting the IDEA mandate requiring schools to provide both "special education" and "related services," Congress pointedly chose to exclude only "special education" from the Basic program and not to exclude "related services" (or a similar description thereof). Pub. L. 94-212, sec. 751 (1976) (Ex 24). Congress did so precisely because it did not want to exclude medically necessary treatments like ABA therapy from Basic program coverage. When passing the "special education" exclusion into law, Congress, therefore, clearly recognized the distinction between "special education" and "related services" and chose only to exclude "special education" and not to exclude medically necessary "related services" like ABA therapy.

VI. The Rules, Licensing Practices, and Education for ABA Therapy Professionals are Distinct from those for Special Education Teachers

ABA therapy professionals have organized themselves as a section of the American Psychological Association, the Association for Behavior Analysis International, the Society for the Advancement of Behavior Analysis, the Behavior Analysis Certification Board, the Association of Professional Behavior Analysts, and other independent, self-regulating organizations *unrelated* to any organizations around which the "special education" community has coalesced. The rules and practices of these ABA organizations reveal that ABA therapy is distinct from "special education."

According to the American Psychological Association's description of "behavioral psychology," ABA therapy professionals are "certified by the Behavior Analyst Certification Board, Inc." American Psychological Association, "Behavioral Psychology," available at http://www.apa.org/ed/graduate/specialize/behav.aspx. As stated by a U.S. District Court, "[t]he

nationally accredited certification agency, the Behavior Analyst Certification Board ("BACB"), provides a standardized certification as a [Board Certified Behavior Analyst]." *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d 1226, 1232 (D. Or. 2010), citing BACB, Standards for Board Certified Behavior Analyst, available at http://www.bacb.com/becom_frame.html.

The Association for Behavior Analysis International ("ABAI") defines an "Applied Behavior Analyst" as "an individual who by training and experience meets the requirements for licensing by the Board and is duly licensed to practice applied behavior analysis in the State/Commonwealth." ABAI Model Licensing Act for Behavior Analysts, sec. 201, available at http://www.abainternational.org/BA/practice_ABAI_Model_Act.asp. This formal certification process of ABA therapy professionals is entirely distinct from the certification and training required of "special education" teachers.

Indeed, the BACB and the ABAI require ABA professionals, *not* special education teachers or other education professionals, to develop, formulate and supervise ABA therapy and to educate and train Applied Behavior Analysis professionals. The BACB and the ABAI do not permit special education teachers or other special education professionals to develop, formulate, or supervise ABA therapy or to educate and train Applied Behavior Analysis professionals. Special education teachers and other education professionals are not even permitted to perform ABA therapy under the supervision of an ABA professional without training in ABA therapy over and above their special education training. The rules and practices of the BACB and the ABAI, therefore, reveal that ABA therapy does not constitute special education.[13]

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[13] Note also that the ABAI's Model Licensing Act requires that "[a]ll communications between a Licensed Behavior Analyst or Licensed Assistant Behavior Analyst and the individuals with whom the licensee engages in the practice of applied behavior analysis are confidential and shall be considered as **privileged communications**." ABAI Model Licensing Act for Behavior Analysts, sec. 217, available at http://www.abainternational.org/BA/practice_ABAI_Model_Act.asp (emphasis added). This is a "behavior analyst-client privilege," much like a "psychologist-client" privilege. Certainly, such a privilege does not exist for communications between a special education teacher and her student.

Notably, in its ECHO program, DoD itself requires ABA therapy professionals and psychologists, *not* special education teachers or other education professionals, to develop, formulate and supervise ABA therapy. See TRICARE Operations Manual 6010.56-M, ch. 18, sec. 9. Thus, DoD does not permit special education teachers or other special education professionals to develop, formulate, or supervise ABA therapy, because DoD knows that special educators do not have the appropriate ABA knowledge, training, or experience. DoD's own regulations and practices, therefore, reveal that even DoD regards ABA therapy to lie outside of the jurisdiction and competence of special educators and within the jurisdiction and competence of ABA professionals. In other words, despite the words and labels it uses, DoD ***acts*** as if ABA therapy is a field of practice distinct from special education.

As explained by the federal court in *McHenry*:

> **A defining feature of ABA intervention is treatment directed by a professional with advanced formal training in behavioral analysis.** . . . A BACB certification as a BCBA requires, at a minimum, a masters degree and **several hundred hours of graduate level instruction or mentored or supervised experience with another BCBA.** Additionally, multiple universities throughout the United States provide **advanced degree programs in ABA therapy** which involve a combination of course work and practical experience.

McHenry v. PacificSource Health Plans, 679 F. Supp. 2d 1226, 1232 (D. Or. 2010) (emphasis added). The University of Kansas, for example, has a Department of Applied Behavioral Science through which "the department offers a Master's of Arts (M.A.) in Applied Behavioral Science and a Doctor of Philosophy (Ph.D.) in Behavioral Psychology." University of Kansas Department of Applied Behavioral Science, available at http://www.absc.ku.edu/graduate/. Therefore, through training, certification, and education, ABA therapy professionals receive instruction and credentials uniquely qualifying them to perform ABA therapy.

Indeed, one reason for the absence of ABA therapy in the nation's K-12 public schools is because special education teachers are not trained, licensed, certified, or qualified to be ABA

therapists. A master's degree in special education will not provide a teacher with the requisite knowledge or training to perform ABA therapy. A teacher's crude understanding and application of basic principles of psychology, for instance, do not render her capable of applying ABA at a clinically and therapeutically significant level of intensity. As explained by a leading expert on autism treatments and research – a Board-Certified Behavior Analyst who holds a Master's Degree in Educational Psychology and a Ph.D in Psychology-Analysis of Behavior, "unfortunately, however, most special education teacher certification programs provide little, if any, training in ABA; very few provide all of the didactic training and supervised practical experience that the discipline deems necessary to practice ABA at even a rudimentary level." (Ex 27, *Letter to Assistant Secretary of Defense for Health Affairs dated September 2, 2008*, p.4).

In the nation's universities where special educators are trained, ABA therapy is, therefore, not regarded as a constituent part of "special education" or part of the special education curriculum. No special education program, by itself, without an additional and separate multi-year course of instruction in ABA therapy, qualifies a special education teacher to perform ABA therapy.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment on Count III of the Complaint alleging violations of 5 U.S.C. 706, in the form of an Order vacating Defendants' policy that ABA therapy is "special education" under the Military Health Benefits Statute, and with the instruction that DoD shall immediately provide TRICARE Basic benefits for ABA therapy and shall reimburse the military families for all wrongfully denied benefits. (Ex 1, *Proposed Order*).

Respectfully submitted,

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Dated: July 30, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KENNETH BERGE and DAWN BERGE, on behalf of themselves and their minor child Z.B., as individuals and on behalf of all others similarly situated,

Plaintiffs,

Case No. 10-cv-00373-RBW
Hon. Reggie B. Walton

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF DEFENSE, TRICARE MANAGEMENT ACTIVITY, and ROBERT M. GATES, United States Secretary of Defense, jointly and severally,

Defendants.

STATEMENT OF MATERIAL FACTS
ACCOMPANYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT TO SET ASIDE, AS CONTRARY TO LAW,
DEFENDANT'S POLICY THAT APPLIED BEHAVIORAL ANALYSIS (ABA)
THERAPY IS "SPECIAL EDUCATION" RATHER THAN HEALTH CARE

I. The Existence and Nature of DoD's Policy

Because DoD represents to this Court in its motions and briefs that it does not have a systematic policy (or an administrative record) defining coverage for ABA therapy under its Basic health benefits plan, Plaintiffs take some pains now to set forth the reality of the policy's existence and to describe the nature and contours of that policy.

It is Department of Defense policy that ABA therapy is "special education" and is, therefore, based on that pretext, excluded from coverage under the TRICARE Basic health benefits program pursuant to 10 U.S.C. 1079(a)(9). The named Plaintiffs have been subjected to DoD's policy, but the instant dispute is not limited to the wrongful denial of the named Plaintiffs' health benefits. It is a dispute about the legality of DoD's ABA therapy policy – a policy that applies uniformly to all beneficiaries and which DoD has invoked to exclude thousands from care and to deter thousands of claims.[1] DoD has repeatedly declared in its informal adjudications (initial considerations of beneficiaries' claims, reconsiderations, and appeals of benefits denials) and in its informal, unwritten rules that ABA therapy is "special education" or "educational." While the exact details of how DoD arrived at its policy are unknown,[2] the existence of the policy, and DoD's adherence to it, are beyond question. (See, e.g., Ex 2, *TMA Letter dated July 3, 2001*).

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[1] See, e.g., *Salazar v. District of Columbia*, 560 F. Supp. 2d 6, 8 (D.D.C. 2008) ("[A]s Plaintiffs point out, the overarching legal issue in deciding NHB's claim is whether the District of Columbia's Medicaid Program is barred from providing such [ABA] therapy because it is not covered by the Medicaid statute. That position of the District of Columbia is **applicable to all children in the Plaintiff class who have been or will in the future be prescribed ABA therapy** services to correct or ameliorate their autism or related autistic disorders. Thus, this is not an issue pertaining to NHB only, but rather an issue which affects all autistic children who may use or need such services.") (emphasis added).

[2] DoD's policy was not subjected to public notice and comment, was not published in the Federal Register or Code of Federal Regulations and is not even in the Policy, Operations, Reimbursement and other Manuals that collectively constitute the written policies and practices of the military health system.

The Military Health Benefits Statute provides that "the Secretary of Defense shall administer this chapter for the armed forces under his jurisdiction." 10 U.S.C. 1073. Federal law, therefore, authorizes the Secretary to promulgate policies and rules in his administration of the statute. The Secretary of Defense has delegated authority to the Assistant Secretary of Defense for Health Affairs to provide policy guidance, management control, and coordination, and to develop, issue, and maintain regulations. 32 C.F.R. 199.1(b)(2)(i). TRICARE Management Activity ("TMA"), in turn, manages the TRICARE health care program for active duty members, retirees, their families, and others entitled to Department of Defense health care under the authority of the Assistant Secretary of Defense for Health Affairs, an officer of DoD.

DoD carries out its unlawful policy that ABA therapy is "special education" by denying coverage for ABA therapy except when the beneficiary is eligible for and enrolled in the Extended Care Health Option ("ECHO") program, which is authorized to provide "special education" benefits. In addition to the TRICARE Basic benefits to which all active duty and retiree families are entitled without limitation as to type of beneficiary or amount, there are "extended" benefits available to some but not all military families pursuant to ECHO, 10 U.S.C. 1097(d), (e) and (f). ECHO benefits are available only to dependents of active duty members with certain disabilities, one of which is autism. The ECHO program is not available to the autistic dependents of retirees. Under ECHO, the autistic children of active duty members are entitled to only $36,000 per year[3] in benefits for certain items and services not covered by the Basic health care program, including "special education." Because retirees with autistic children are covered only by the TRICARE Basic health benefits program and not by ECHO, TMA refuses to pay for any ABA therapy for their children with autism. Thus, according to DoD's

[3] The $36,000 annual cap on benefits consumed under ECHO prevents ECHO from covering a substantial amount of the ABA therapy expenses incurred annually by many active-duty families.

policy, because ABA therapy is "special education," it is a covered benefit only under ECHO, where it is capped, and it is not a covered benefit at all under the TRICARE Basic program.

DoD has widely disseminated and applied its policy to deny benefits for ABA therapy under the Basic program. In its letters to military families denying their claims for ABA therapy, DoD references the policy manual provision defining "special education" for purposes of the ECHO program, and asserts that "ABA therapy cannot be authorized unless the beneficiary is enrolled in the ECHO program." (Ex 3, *Redetermination Denial for Z.B. dated June 18, 2007*). DoD further states in its denials: "The **educational** modality known as applied behavioral analysis is included as a benefit under the issuance (ECHO)[.]" (*Id.*) (emphasis added).

In a denial letter to another beneficiary, DoD states:

> TRICARE coverage of Applied Behavioral Analysis (ABA) therapy is requested. ABA therapy is offered as a **special education** benefit to Extended Care Health Option (ECHO) enrolled beneficiaries only as per TRICARE Policy Manual, Chapter 9, Section 9.1 (Special Education). At this time, the beneficiary is not eligible for ECHO and therefore the request for ABA therapy is denied.

(Ex 4, *Denial for J.C. dated December 22, 2009*).

DoD has also announced this policy in letters to contractors and in public statements. For example, in a July 3, 2001, letter from the Office of the Assistant Secretary of Defense for Health Affairs to the Director of Contract Management and Compliance for one of TMA's contractors, TMA states as follows:

> You asked if all ABA services are payable only under the PFPWD [now known as ECHO] or if some can be cost shared under the Basic Program. As ABA is an **educational program**, by regulation it is covered only under the PFPWD [now, ECHO]. TMA's Office of Medical Benefits and Reimbursement Systems states that ABA does not include medical services such as speech or occupational therapy as contemplated by the Basic Program.
>
> You also noted that one provider in the Central Region apparently bills ABA as psychotherapy under procedure code 90806. We question whether that is the appropriate code. For example, 98220 or 98290 for **special education** might be more appropriate.

(Ex 2, *TMA Letter dated July 3, 2001*) (emphasis added). According to DoD, "TMA reached that determination only after an extensive review, including a technology assessment and coordination within the agency." (*Id.*).

Likewise, in a March 14, 2001, letter from the Office of the Assistant Secretary of Defense for Health Affairs to the vice president of one of its health care contractors, TMA states:

> It has been determined by the Medical Benefits & Reimbursement Systems office, that "Applied Behavioral Analysis (ABA) is an **educational program** which may be considered for TRICARE cost sharing through the Program for Persons with Disabilities (PFPWD) [now known as ECHO] in accordance with the TRICARE Policy Manual, Chapter 8, Sections 1.9 and 1.11[.]

(Ex 5, *TMA Policy Letter dated March 14, 2001*) (emphasis added). This statement by TMA of DoD's policy is effectively the same as that which TMA's Deputy Director, Major General Elder Granger, provided to Florida Congressman Jeff Miller in 2008. When Congressman Miller inquired why the Berges' request for ABA therapy benefits was denied, General Granger stated that "ABA is an educational, as opposed to a medical benefit, and as such, is available only under the program authorized by 10 United States Code 1079(d)-(f) [now known as ECHO]." (Ex 6, *Letter from Major General Granger*).

DoD also announced its position on ABA therapy in its July 2007 Report and Plan on Services to Military Dependent Children with Autism, wherein DoD stated: "ABA, as a behavioral intervention that shapes behaviors and teaches skills, is a **special education** service that can be cost-shared under ECHO." (Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p. 10) (emphasis added). Likewise, DoD stated its policy when it opposed a congressional bill that proposed to amend the Military Health Benefits Statute so that "[t]he Secretary may not consider the use of applied behavior analysis or other structured behavior programs under this section to be **special education** for purposes of section 1079(a)(9) of this title." (Ex 8, *Memo Opposing H.R. 1600*) (emphasis added). In its testimony opposing

the bill, DoD objected that the proposed bill would instruct "that the Secretary may not consider applied behavior analysis (ABA) to be **special education**, and thereby implying that ABA is a medical intervention for ASD rather than an educational intervention." (*Id.*) (emphasis added).

Thus, DoD's unlawful policy has been widely disseminated and applied to deprive military families of benefits for ABA therapy that children with autism desperately need if they are to have any hope of living a more independent life. In fact, 47 affidavits are attached from military families who have been deprived of ABA therapy benefits from TMA based on DoD's unlawful policy. (Ex 9, *Military Family Affidavits*). According to DoD data released in response to a FOIA request, there are as many as 22,000 families who have been denied benefits due to DoD's policy. (Ex 10, *DoD FOIA Response*).

II. ABA Therapy Is a Highly Effective Treatment for Autism

In order to understand why ABA therapy is *not* "special education" for purposes of the "special education" exclusion in 10 U.S.C. 1079(a)(9) of the Military Health Benefits Statute, it is necessary to understand what ABA therapy actually *is*.

ABA therapy is an intensive, enormously nuanced psychotherapeutic intervention that is medically necessary for children with autism. Accordingly, ABA therapy is a benefit to which the class of military families, on whose behalf this case is prosecuted, are entitled under the TRICARE Basic program – the package of benefits available to all military families that covers medically necessary services. Even DoD itself, when approving limited ECHO benefits for autistic children of active duty military personnel, has stated that ABA therapy is "medically necessary." (Ex 11, *ABA Therapy Approval Under ECHO*).

ABA therapy is a scientifically valid, medically accepted, and mainstream autism treatment – designed, supervised, and performed by trained and skilled ABA therapy professionals. Among other things, ABA therapy addresses social, motor, and verbal behaviors,

as well as reasoning skills. ABA is a science concerned with the behavior of people. It attempts to understand, explain, describe, and predict behavior. It enables children with autism to learn and perform functions that they would not otherwise be able to accomplish. (In broad support of the foregoing, see, *inter alia*, Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*; Ex 13, *NIMH, Autism Spectrum Disorders: Pervasive Developmental Disorders*; Ex 14, *Autism Collaboration Letter dated May 19, 2008*; Ex 15, *American Academy of Pediatrics, "The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children," Pediatrics vol. 107 no. 5, May 2001*; *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d 1226 (D. Or. 2010), and all sources cited therein; *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 905 (S.D. Ohio 2008), *aff'd* , 339 Fed. Appx. 542 (2009), and all sources cited therein).

Autism is a complex developmental disability, which adversely affects, among other things, verbal and nonverbal communication and social interactions, a child's educational performance, and the overall ability of a person who suffers from the condition to function in society. (*Id.*) The characteristic behavior of individuals with autism includes impaired social interaction, impaired communication abilities, restricted interests, repetitive behavior, stereotyped movements, resistance to environmental change or change in daily routines, obsessive attachment to objects, decreased motor skills, tantrums, apparent over-sensitivity or under-sensitivity to pain, fearlessness, aloofness, and unusual responses to sensory experiences. (*Id.*) Without proper treatment, autism can be a debilitating and entirely disabling condition, leading people to grow into adulthood without the ability to perform the most basic of life functions and activities of daily living. (*Id.*)

ABA therapy interventions include the use of reinforcing consequences to produce socially significant improvement in human behavior; the functional analysis of the relations

between environment and behavior; the design, implementation, and evaluation of environmental modifications; and direct observation and measurement to assess effectiveness. (Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*). Reputable ABA treatment is available from facilities around the country that are managed and staffed by clinicians with considerable education, certifications, and training in ABA therapy. (Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism, attachments 1 and 2*). ABA therapy is the most effective autism treatment, is dramatically more effective than any other treatment, and is in almost all cases an autistic child's best and only hope of substantial reduction of the behavioral symptoms of autism.

Numerous studies show that ABA therapy is the most effective treatment for children with autism. For example:

- The United States Surgeon General States that "30 years of research demonstrated the efficacy of applied behavioral methods in reducing inappropriate behavior and increasing communication, learning and appropriate social behavior." (Ex 16, *Mental Health: A Report of the Surgeon General, ch. 3, p. 5*).

- The National Institute of Mental Health similarly concludes that "among the many methods available for treatment and education of people with autism, applied behavior analysis (ABA) has become widely accepted as an effective treatment." (Ex 13, *NIMH, Autism Spectrum Disorders: Pervasive Developmental Disorders, p. 19*).

- The Association for Science in Autism Treatment endorses ABA as the only treatment modality with scientific evidence supporting its effectiveness. ASAT, "Recommendations of Expert Panels and Government Task Forces," available at http://www.asatonline.org/intervention/recommendations.htm.

In a letter to the Honorable Members of the U.S. Senate Armed Services Committee, dated September 19, 2008, 58 world renowned experts in psychiatry, psychology, medicine, and behavioral science and autism research and practice stated as follows:

> ABA is medically necessary to enable a child with autism to function safely and independently in all aspects of life. The effectiveness of ABA-based intervention in Autism Spectrum Disorders has been well documented through 5 decades of research by using single-subject methodology and in controlled studies of

> comprehensive early intensive behavioral intervention programs. ABA is effective at developing and improving language and communication skills, social interactions, positive family relationships, daily living skills, cognitive and executive functioning, and ameliorating harmful behaviors. It is not too much to say that ABA therapy restores the very humanness stolen by autism.

(Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*).

Likewise, in a letter to Secretary of Defense Robert Gates, a collaboration of "the longest standing autism organizations" demanded TRICARE Basic coverage for ABA therapy and that DoD "recognize the medical necessity of treatment for autism spectrum disorders. Treatment for autism spectrum disorders is medically necessary to treat a neurological disorder and necessary to prevent future physical and mental injury to the patient." (Ex 14, *Autism Collaboration Letter dated May 19, 2008*).

Based on, among other things, the consensus that ABA therapy is the most effective treatment for autism, at least 22 states have laws requiring private insurers to provide ABA therapy as a benefit, and bills requiring private insurers to provide ABA therapy as a benefit are currently working their way through the legislative process in 15 other states. (Ex 17, *Map of State Autism Insurance Reform Bills*). The State of Michigan's Insurance Commissioner has held, based on independent medical examinations, that ABA is a reasonable, safe, and necessary treatment for children with autism. Intense behavioral intervention for children with autism is the standard of care as recommended by the American Academy of Pediatrics and is an appropriate therapeutic management of autism. (Ex 15, *American Academy of Pediatrics, "The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children," Pediatrics vol. 107 no. 5, May 2001*).

In its 2007 Report and Plan on Services to Military Dependent Children with Autism, the DoD itself acknowledges "the growing identification of ABA, unique among treatments used to treat the deficits of autism, as the treatment intervention with substantive evidence for its

effectiveness." (Ex 7, *2007 Report and Plan on Services to Military Dependent Children with Autism*, p 11).

In January of this year, the U.S. District Court for the District of Oregon held that "ABA therapy has become one of the standard treatment options for autistic children throughout the nation." *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d 1226, 1238 (D. Or. 2010). In holding that ABA therapy does not fall within an insurance policy exclusion for "academic and social skills training," the Court noted that:

> [A]utistic children may exhibit many types of problem behavior detrimental to social or academic progression. A list assembled by one article includes: aerophagy/swallowing, aggression, burxism/teethgrinding, coprophagy/feces eating, dawdling, destruction, depression, disruption/tantrum, drooling, elective mutism, elopement (run), feces smearing, fears, food refusal, food theft, genital stimulation, hallucinating, hyperactive behavior, hyperventilation, inappropriate vocalizations, insomnia, noncompliance, obesity, obsessive compulsive disorder, pica, public disrobing, rapid eating, rectal digging, rumination, seizure behavior, self-injurious behavior, stereotypy, tongue protrusion, and vomiting. SR 1235 (Robert H. Horner, *et al, Problem Behavior Interventions for Young Children with Autism: A Research Synthesis,* 32 J. Autism and Developmental Disorders 423, 431 (October 2002)).

Id. at 1240. The court continued as follows:

> The focus of ABA therapy on discrete behaviors affecting all facets of living sets it apart. Researchers have found ABA to be effective in reducing problem behaviors. . . and in improving a child's ability to function in multiple areas including 'intellectual, social, emotional, and adaptive functioning.' . . .While aimed at improving social and academic functioning, it does this by specifically addressing behavioral deficits possessed by autistic children that interfere with every area of their life, not by educating kids on social norms or teaching study skills or other tools specific to academic success.

Id. at 1241 (citations to autism studies omitted).

Likewise, the U.S. District Court for the Southern District of Ohio recently held that ABA therapy is a "medically necessary" service for purposes of reimbursement under the federal Medicaid statute. *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 905 (S.D. Ohio 2008), *aff'd* , 339 Fed. Appx. 542 (2009). Accepting a mountain of professional

evidence produced by the plaintiffs in that case, the court held as follows:

> Plaintiffs provided sufficient evidence that ABA therapy, when recommended by a licensed practioner of the healing arts, is a **medically necessary service which provides the maximum reduction of a mental or physical disability**. Because the proposed administrative rules will effectively cut off funding for medically necessary services, Plaintiffs have established a likelihood of success on the merits.

Id. at 917. The evidence produced by the plaintiffs in *Parents League*, accepted by the court, included the following compelling facts about autism and ABA therapy:

- Autism is a "complex neurodevelopmental disability that generally appears during the first three years of life which impacts the normal development of the brain, resulting in impairments of social interaction, verbal and non-verbal communication, leisure and play activities, and learning."

- Autism is a diagnosis found in the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed., 1994 (DSM IV).

- Research has demonstrated that by providing a child with autism appropriate services and supports, significant gains in most life areas can be achieved and some children can go on to live and work independently as adults.

- For an autistic child, "the best treatment plan will include ABA [applied behavioral analysis], the only treatment approach confirmed as effective by a comprehensive evaluation of all proposed therapies in a well known government sponsored review process."

- ABA therapy is "a highly effective form of behavioral treatment in virtually all cases."

- Intensive behavioral interventions for autistic children "represent the treatment modality that provides the maximum reduction of physical and mental disability to achieve their best possible functional level."

Id. at 908.

Successful treatment for children with autism depends on quick intervention and intensity of treatment hours. Effective ABA treatment requires 25 to 40 hours per week of treatment, usually over a period of years. *McHenry, supra* at 1232. "Research has . . . shown ABA therapy for autistic children is most effective when it is provided 30-40 hours per week in an intensive

one-on-one setting." *Parents League*, *supra* at 908. The American Academy of Pediatrics and the National Research Council both recommend a minimum of 25 hours per week of ABA-based interventions. (Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*). The Navy and Army Surgeons General recommend up to 40 hours per week of ABA treatment. (Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*; Ex 18, *U.S. Navy Surgeon General Letter dated January 17, 2008*; Ex 19, *U.S. Army Letter dated December 10, 2007*). In some cases, children with autism have completely recovered, and lost their autism diagnosis after receiving intensive ABA therapy, usually 40 hours per week, starting at a young age. Behavior Analysis Association of Michigan, "What's New at BAAM," available at http://www.baam.emich.edu/baammainpages /whtnew.htm (The Today Show, April 17, 2010: "Can kids 'recover' from autism?"). "Early, and effective, treatment of children with autism has been shown to provide significant improvement, including the return of those children to the general community." *Parents League*, *supra* at 918.

Experts emphasize that it is imperative to provide the prescribed level of treatment to children with autism. "Treatment delayed or not provided at the prescribed amount diminishes effectiveness" of ABA therapy, often dramatically so. (Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*). The delay or denial of appropriate and necessary ABA therapy interventions "has negative impacts to the health and progress of the child with autism resulting in increased burdens on the family, and anticipated higher health care costs resulting from interruptions in treatment or failure to provide for prescribed level of care." (Ex 12, *Letter to U.S. Armed Services Committee dated September 19, 2008*). As held recently by the U.S. District Court in *Parents League*, "if the Plaintiff children are no longer able to receive the medically recommended 35-40 hours of ABA therapy per week, there is sufficient evidence that the children will experience regression. . . . [I]f services are stopped, the Plaintiff children will

suffer irreparable injury." *Supra* at 917.

III. DoD's Benefits Denials, Public Statements, and Internal Documents Acknowledge that ABA Therapy Is Medically Necessary Health Care

Plaintiffs have obtained internal DoD documents, wherein DoD's own high level, uniformed officers acknowledge that ABA therapy is medically necessary health care to which military families are entitled by law and is not special education. The officers further warn that the policy of classifying ABA therapy as "special education" rather than medically necessary health care is harming the military's morale, cohesion, and organizational vigor and the trust of uniformed men and women in the good intentions and honesty of the DoD's civilian bureaucratic leadership.

For example, according to the minutes of a "TRICARE / Military Family Meeting" held on December 10, 2007, at TRICARE's main offices: "Of significance to the discussion was [TMA's own Deputy Director, Major General] Granger's acknowledgement ABA/IBI was a 'medically necessary' form of treatment for autism and not simply a special education service. This understanding of ABA/IBI therapy essentially clears the way for policy change and better access to benefits through TRICARE." (Ex 20, *2007 TRICARE / Military Family Meeting*). Because ABA therapy is "medically necessary," as General Granger stated, it must be covered as a Basic program benefit.

This acknowledgment by General Granger – TMA's own Deputy Director – is just one of many such acknowledgments by numerous high-ranking DoD officials, discussed below. Importantly, General Granger, as well as the other high-ranking officials, could not even contemplate let alone recommend "policy change" mandating the coverage of ABA therapy if it were "special education," because, by law, DoD is prohibited from providing Basic coverage for "special education."

In a memorandum to the Assistant Secretary of Defense for Health Affairs dated January 17, 2008, Vice-Admiral Adam Robinson, the Surgeon General of the Navy, states that "the assurance of family care is critical for Mission readiness." (Ex 18, *U.S. Navy Surgeon General Letter dated January 17, 2008*). In an attachment to that memorandum, the Navy Surgeon General makes "Recommended Changes to DOD Policies on Services for Military Dependent Children Diagnosed with Autism and Their Families." (*Id.*). Specifically, he recommends "Intensive Behavioral Intervention (IBI) up to 40 hours per week, to include Applied Behavioral Analysis (ABA), be made part of the TRICARE Basic Benefit. Intensity and duration of IBI should be determined by the PCM in consultation with a developmental pediatrician." (*Id.*). The United States Navy Surgeon General has, therefore, determined that ABA therapy is a medically necessary health care benefit to which all military families are entitled under the TRICARE Basic program.

In a memorandum dated January 17, 2008, Major General Thomas Deppe, Air Force Vice Commander, speaking on behalf of the Air Force Space Command, makes "recommendations for changes to existing DoD policies for treatment of military children diagnosed with autism spectrum disorder." (Ex 21, *U.S. Air Force Letter dated January 17, 2008*). Implicitly recognizing that ABA therapy is Basic "health care" to which all military families are entitled rather than "special education" to which military families are not entitled pursuant to their Basic health care benefits package, the Air Force Space Command recommends "chang[ing] current TRICARE policy to provide applied behavior analysis (ABA) services as a basic entitlement of medical necessity to military children diagnosed with an ASD." (*Id.*). The USAF Vice Commander continues as follows:

> Currently ABA is categorized as a special education service under the extended care health option (ECHO). This creates barriers to service (eligibility, paperwork and determination) and limits the amount of coverage to $2500 per month. . . . Ensure the entitlement for ABA covers appropriate levels of treatment, as defined

> by research and commercial practice, for effective service delivery (up to 30-40 hours per week). Currently, an arbitrary cost cap is established ($2500 per month). . . . Levels of treatments should be determined based on the needs of the child and the recommendations of the physician.

(*Id.*). "There is not a more important mission than taking care of Airmen and their families. We look forward to improved access and services for our families affected by ASD[.]" (*Id.*). The United States Air Force and Space Command has, therefore, determined that ABA therapy is a medically necessary health care benefit to which all military families are entitled under the TRICARE Basic program.

In a memorandum dated December 10, 2007, Army Vice Chief of Staff and Four Star General Richard Cody, speaking on behalf of the Army, makes recommendations for changes to "DoD policies for treatment of military children diagnosed with autism." (Ex 19, *U.S. Army Letter dated December 10, 2007*). Implicitly recognizing that ABA therapy is Basic "health care" to which all military families are entitled by statute, General Cody states as follows:

> In addition to pursuing legislation that assures the necessary medical care and education for children with ASD and their families, the Army recommends DoD implement the following "quick wins": make IBI [intensive behavior intervention services like ABA therapy] a basic TRICARE entitlement as a medically necessary service to treat the disabling effects of ASD, and authorize up to 40 hours per week of IBI services.

(*Id.*). Indeed, General Cody expressly notes the Army's finding that changing DoD policy to recognize that ABA therapy is a Basic medical benefit as opposed to "special education" does not require legislation; that is, it does not require a change in current law. (*Id.*). Rather, ABA therapy is a Basic health care benefit to which military beneficiaries are entitled by current law.

Furthermore, in a letter to the Assistant Secretary of Defense for Health Affairs dated May 25, 2007, Major General Gail Pollock (Acting Surgeon General of the Army), Major General Carla Hawley (Commander of the Pacific Regional Medical Command), and Major Shannon Beckett (Action Officer for the Army and Marine Corps Autism Task Force)

collectively recommend "changes to existing DoD policies for treatment of military children diagnosed with Autism Spectrum Disorder," including "chang[ing] current TMA guidelines to provide ABA services as a basic entitlement to military children suffering from ASD, rather than through the current ECHO program." (Ex 22, *Letter to Assistant Secretary of Defense for Health Affairs dated May 25, 2007*). These three military leaders make the following observations in their combined letters and enclosures:

> Without effective intervention, an estimated 90% of individuals with autism will require lifelong care. ABA has been shown to reduce this figure to below 50% and reduce the potential lifelong costs by two thirds. . . . Science supports a 30-40 hours per week ABA program for each child with ASD. . . . In many cases, families are forced to respond to their disabled child's needs by leveraging their financial assets or resorting to litigation. Bearing the financial burden for services, or going without services, is simply not right for our military families who move so often they aren't able to establish continuity of care. . . . Military families reported resorting to litigation, falling into debt and mortgaging their homes in order to secure treatment for their children. . . . Department of Defense should recognize the efficacy of ABA as a treatment for autism and develop policies and increase access to this treatment. . . . It would be difficult to overstate the negative impact Autism Spectrum Disorder has placed upon our military families.

(*Id.*). Therefore, the Acting Surgeon General of the United States Army, the Pacific Regional Medical Command, and the Army and Marine Corps Autism Task Force have determined that ABA therapy is a medically necessary health care benefit to which all military families are entitled under the TRICARE Basic program.

Thus, DoD's own high level, uniformed officers overwhelmingly acknowledge that ABA therapy is medically necessary health care to which military families are entitled under the TRICARE Basic program, and is not excluded "special education."

Respectfully submitted,

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Dated: July 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that I served a Motion for Summary Judgment to Set Aside, as Contrary to Law, Defendant's Policy that Applied Behavioral Analysis (ABA) Therapy Is "Special Education" Rather than Health Care, on the following Defendants in this matter electronically via CM/ECF, this 30th day of July 2010:

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